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## The Seventeenth Amendment and Federalism in an Age of National Political Parties

David Schleicher

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# The Seventeenth Amendment and Federalism in an Age of National Political Parties

DAVID SCHLEICHER\*

*Despite it being the constitutional amendment that most directly altered the structure of the federal government, little is known about how and why the Seventeenth Amendment was enacted. Existing scholarship on why the Constitution was amended to require direct elections for U.S. Senators, rather than having them appointed by state legislatures, has troubled accounting for two major puzzles. Why were state legislatures eager to give away the power to choose Senators? And why was there virtually no discussion of federalism during debates over removing a key constitutional protection for states governments?*

*This Article offers a theory that can provide an answer to both of these questions. Support for direct elections was, at least in part, a result of the rise of ideologically coherent, national political parties. The rise of truly national parties meant that state legislative elections increasingly turned on national issues, as voters used these elections as means to select Senators. State politicians and interest groups supported direct elections as a way of separating national and state politics. Advocates of repealing the Seventeenth Amendment claim the mantle of federalism, but repeal would reduce the benefits of federalism, making state legislatures into something akin to electoral colleges for U.S. Senators.*

*While important in its own right, the history of the Seventeenth Amendment can also teach us a great deal about how federalism functions in eras of strong national political parties. First, national political parties have not generally served as “political safeguards of federalism,” but instead have made state politics turn on national issues. Second, despite the Seventeenth Amendment, state elections still largely turn on national politics. Although state issues are sometimes important, the most important factor in state legislative elections is the popularity of the President. To achieve the benefits for state democracy sought by supporters of the Seventeenth Amendment, election law reform would be more effective than structural constitutional changes.*

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\* Associate Professor, George Mason University School of Law. I would like to thank Matt Kelly, Justin Raphael and, particularly, Mark Quist and Mary Watson for their extremely helpful research assistance. I would also like to thank Kelli Alces, Jessica Bulman-Pozen, Christopher Elmendorf, David Fontana, Heather Gerken, Michael Gilbert, Bruce Johnsen, and Todd Zywicki and participants at workshops at George Mason, Marquette, and the University of Virginia for their useful comments.

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## INTRODUCTION

For a brief moment in 2010, the Seventeenth Amendment suddenly and surprisingly became news. Before the Seventeenth Amendment gave each state's citizens the power to directly elect U.S. senators, state legislatures had the power to appoint them.<sup>1</sup> After years of being a niche cause for a few legal scholars and fringe political activists,<sup>2</sup> repealing the

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1. The Constitution originally read: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and each Senator shall have one Vote." U.S. CONST. art. I, § 3, cl. 1 (amended 1913). The Seventeenth Amendment changed this provision to read: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. CONST. amend. XVII.

2. The leading scholars pushing repeal were (now Judge) Jay Bybee, C.H. Hoebeke, and Todd Zywicki. See, e.g., C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for*

Seventeenth Amendment became popular among Tea Party figures and Republican candidates for office.<sup>3</sup> Prominent conservative figures like Texas Governor Rick Perry, Supreme Court Justice Antonin Scalia, and columnist George Will came out in favor of repeal.<sup>4</sup> The movement to repeal the Seventeenth Amendment, once well outside of the popular mainstream, was hot.

And then it went cold, with attention dying down and no legislative action,<sup>5</sup> despite several proponents of repeal getting elected to Congress.<sup>6</sup> But this upsurge in attention to the Seventeenth Amendment—and the continuing support for repeal in Congress and beyond—raises one of the great, unanswered questions in constitutional history: Why did we take away from state legislatures the power to select senators, which James Madison described in *The Federalist No. 62* as so “congenial with the public opinion” that it was “unnecessary to dilate?”<sup>7</sup>

The academic literature has struggled with this question, pointing to explanations that are, at best, incomplete or too weak to explain the passage of an constitutional amendment. Most problematically, existing theories explain little about the central puzzle in the historical record: state

*Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997) [hereinafter Zywicki, *Beyond the Shell*]; Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994) [hereinafter Zywicki, *Senators and Special Interests*]. For a discussion of support for repeal among political activists, see Kevin Drum, *Repeal the 17th Amendment!*, MOTHER JONES (Aug. 15, 2011, 5:17 PM), <http://www.motherjones.com/kevin-drum/2011/08/repeal-17th-amendment> (discussing long-term support for repeal in John Birch Society and others on the “fringe of movement conservatism”).

3. See Alex Seitz-Wald, *Repeal the 17th Amendment! The Surprising Republican Movement to Strip Voters of Their Right to Elect Senators*, SALON (Aug. 16, 2012, 2:16 PM), [http://www.salon.com/2012/08/16/repeal\\_the\\_17th\\_amendment](http://www.salon.com/2012/08/16/repeal_the_17th_amendment) (noting support among Tea Party activists, leading figures like Justice Scalia and Gov. Perry, and candidates for office); George F. Will, Editorial, *Sen. Feingold's Constitution*, WASH. POST, Feb. 22, 2009, at A19 (supporting repeal).

4. See Seitz-Wald, *supra* note 3. It even became a campaign issue, with several Democrats running ads criticizing Republican candidates for supporting repeal. See Greg Sargent, *Can Dems Use Tea Party Against GOP on 17th Amendment?*, WASH. POST: PLUM LINE (Sept. 8, 2010, 10:46 AM), [http://voices.washingtonpost.com/plum-line/2010/09/can\\_vulnerable\\_dems\\_teabag\\_gop.html](http://voices.washingtonpost.com/plum-line/2010/09/can_vulnerable_dems_teabag_gop.html) (describing Democratic attack ads based on Republican candidate's support for repeal); Will, *supra* note 3.

5. Dying down, but not dead. For instance, Mark Levin's book *The Liberty Amendments*, calling for repeal of the Seventeenth Amendment, was a *New York Times* number one best seller in 2013. *Best Sellers: Combined Print & E-Book Nonfiction*, N.Y. TIMES, Sept. 1, 2013, at 24 (book review); MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* (2013). Senator Ted Cruz criticized the Seventeenth Amendment in a tweet in 2012. Ted Cruz, TWITTER (Jan. 12, 2012, 6:06 PM), <https://twitter.com/tedcruz/status/157644774369792000> (“17th Amendment was one of the structural changes pushed by progressives that pushed power to Washington and weakened the States.”).

6. In 2010, the most notable supporter elected was Senator Michael Lee. Support for repeal was still alive in campaigns in 2012, when it was endorsed by at least four Republican candidates for Senate—Todd Akin, Jeff Flake, Peter Hoekstra, and Richard Mourdock. See Seitz-Wald, *supra* note 3 (noting support from Akin, Mourdock, Flake, and Hoekstra, and support among several elected officials including Senator Lee). Among these repeal supporters, only Flake was elected. See Ken Belson et al., *Northeast, South, Midwest, West*, N.Y. TIMES, Nov. 8, 2012, at A16 (discussing election results).

7. THE FEDERALIST No. 62, at 377 (James Madison) (Clinton Rossiter ed., 1961).

legislators, state-based interest groups, and political figures committed to states' rights in other contexts did little to contest a constitutional amendment that removed a substantial power from state legislatures.<sup>8</sup> In fact, the direct election of U.S. senators was wildly popular among state legislators, the very people it disempowered.<sup>9</sup> Thirty-one state legislatures passed resolutions calling for a constitutional amendment providing for direct elections, and many passed resolutions calling for a constitutional convention if an amendment was not enacted.<sup>10</sup> In a number of states, a form of direct elections had already been implemented before the passage of the Seventeenth Amendment through a clever ballot rule known as the "Oregon system."<sup>11</sup> Further, the debates over the Seventeenth Amendment in Congress included minimal discussion of any potential negative implications for federalism despite it removing a substantial power from state officials.<sup>12</sup> As Alan Grimes notes, no amendment has so "fundamentally altered the design of the original structure of the government," but scholars have still yet to answer even the most basic questions about the passage of the Seventeenth Amendment.<sup>13</sup>

This Article argues that contemporary Seventeenth Amendment scholarship has ignored a major change in American political life concurrent with the movement supporting direct elections for U.S. senators: the rise of truly national political parties. The combination of having state legislatures appoint senators and the increasing nationalization and ideological coherence of the major parties at the turn of the last century ensured that *state* legislative elections were fundamentally about *national* politics. Voters used state legislative elections to choose senators rather than hold state legislators accountable for their performance in office. The movement for direct elections of senators was driven in part by a perceived need—by state politicians, voters, and interest groups powerful in state politics—to save elections at the state level from becoming mere proxies for national political conflict.<sup>14</sup>

This Article offers both a theoretical argument for why changes in the party system likely had this effect and historical evidence that shows that at least some supporters of the Seventeenth Amendment saw the direct election of senators as a method of preserving state democracy. The fear that state democracy was under threat was not the only reason the

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8. See *infra* notes 57–62 and accompanying text (showing high levels of support for the Seventeenth Amendment in state legislatures).

9. *Id.*

10. See *infra* note 55 and accompanying text.

11. See *infra* notes 57–59 and accompanying text.

12. There was a substantial debate over state rights and the Seventeenth Amendment, but it was not about direct election of senators. See *infra* note 59 and accompanying text. It was instead about whether the Seventeenth Amendment should include a change to the Elections Clause of Article I. *Id.*

13. ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 2 (1978).

14. See *infra* Part II.C.

Seventeenth Amendment passed, but it was an important factor in explaining this substantial constitutional change (and one largely ignored in today's debates over repeal).

Although the history of the Seventeenth Amendment is interesting in its own right, it is particularly important because it can teach us a great deal about how federalism works today, as our political parties are now more ideologically coherent, national in form, and polarized than ever before.<sup>15</sup> While there is an enormous literature debating the benefits and costs of federalism, most legal scholarship and judicial opinions in the field are premised on a belief that increasing the autonomy of state policymaking power provides a set of benefits, from allowing citizens “to vote with their feet” by moving between states with different policies to promote “laboratories of democracy” to giving power to governments that are more responsive to popular opinion.<sup>16</sup> These benefits can then be balanced against the benefits of national resolution of certain issues. But virtually all the normative justifications for “Our Federalism”<sup>17</sup>—varied though they are—turn on the ability of state citizens to use elections to express preferences about state policies and hold state officials accountable. To the extent that a constitutional or legislative change makes it *harder* for state residents to use the apparatus of their state government to achieve policy ends, it should be considered a move *away* from realizing the benefits of federalism. That is, leaving certain powers to states can reduce the benefits of federalism. The original Constitution's delegation of the power to choose U.S. senators was a substantial power held by state legislatures. However, as a result of the increasing nationalization of political parties at the turn of the last century, having state legislatures make these appointments reduced the capacity of state elections to serve as a tool for voters to judge the performance of state officials. The change to direct elections of senators was thus a move toward achieving the normative benefits that we associate with federalism.

Modern proponents of repealing the Seventeenth Amendment claim the mantle of federalism, but they have the case almost entirely backwards. Rather than serving to enhance the values of federalism, repealing the Seventeenth Amendment would ensure that state legislative elections turned on the popularity of U.S. senators. This is only “pro-federalism” if one's view of federalism is purely formal, a counting up of official powers and responsibilities. To the extent that one cares about the benefits that flow from having a federal system, repealing the Seventeenth Amendment would be harmful.

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15. See *infra* notes 207–211 and accompanying text.

16. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.”).

17. The term “Our Federalism” was coined in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

However, the pro-federalism story of the Seventeenth Amendment has an ironic end. Even after the Seventeenth Amendment, voters in state legislative elections continue to respond mostly to national rather than state inputs, leaving state legislatures largely unaccountable and unrepresentative. While repealing the Seventeenth Amendment would make this worse, the single most important factor in determining which party wins state legislative elections today is the popularity of the President.<sup>18</sup> The vast majority of voters who favor President Obama, for example, are likely to vote for Democrats in state legislatures with little attention paid to the actual performance of incumbent state legislators or the position taken by their challengers.

This is largely a function of the fact that the parties on the ballot—Democrats and Republicans—are national in scope. The national parties face legal and practical hurdles in their efforts to create differentiated state party brands that state voters understand as distinct from their national parents. They are, as I have argued in previous work, “mismatched” to the level of government, leaving voters without informative party labels to help them overcome their lack of knowledge about individual legislative candidates.<sup>19</sup> While candidates for governor or mayor are sufficiently high profile that they sometimes create their own brand in the eyes of voters and win races in states and localities in which their party traditionally does not succeed, state legislative parties cannot do the same.<sup>20</sup>

The failures of party democracy at the state level are an important limitation on the functioning of American federalism. Contrary to Larry Kramer’s well-known claim, rather than serving as “political safeguards of federalism,” interaction between state and national political parties can serve to reduce the benefits that flow from protecting state authority under the Constitution.<sup>21</sup> To achieve the pro-federalism ends of the

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18. See Steven Rogers, *Accountability in a Federal System: How Parties Perform in Office and State Legislative Elections* 22–24 (2012) (unpublished Job Market paper), available at <http://www.thebrokenwindow.net/papers/R/Rogers-JobMarketPaper-Web.pdf>.

19. See, e.g., Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363 (2013) (analyzing mismatch); David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT’L L.J. 109 (2011) [hereinafter Schleicher, *What if Europe*] (discussing mismatch in European Parliament elections); David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007) [hereinafter Schleicher, *City Council Elections*] (arguing that there are mismatch problems in city council elections).

20. See, e.g., Jill Colvin, *The Tall Man Cometh: Bill de Blasio Will Bring His Own Brand of Leadership to City Hall*, POLITICKER (Oct. 29, 2013, 8:42 PM), <http://politicker.com/2013/10/the-tall-man-cometh-bill-de-blasio-will-bring-his-own-brand-of-leadership-to-city-hall> (discussing New York City Mayor Bill de Blasio’s approach to campaigning).

21. The two central figures in developing the theory (or rather theories) of the “political safeguards of federalism” are Larry Kramer and Herbert Wechsler. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1523–24 (1994) [hereinafter Kramer, *Understanding Federalism*] (arguing that state-based political parties and the ability of states to interact with federal administrators protects federalism); Larry D. Kramer, *Putting the Politics Back into the Political*

Seventeenth Amendment, reformers would need to come up with methods for making state policies more visible to state voters when they enter the voting booth. Changes to election laws are more likely than constitutional amendments to increase the degree to which state elections turn on the performance and policy positions of state officials and candidates.

As voluminous as it is, contemporary scholarly and public debates about federalism rarely focus on how well state democracy actually works. The history of the Seventeenth Amendment shows that this was not always the case. But today's scholars, jurists, and politicians generally focus on the powers of states and their independence from federal encroachment (and in particular on the Supreme Court's resolution of these questions), or alternatively on cooperation between state and federal officials in administering jointly-run programs, but ignore larger questions about the success or failure of popular representation at the state level. Furthermore, state democracy is not healthy, as it fails to produce policy outcomes that are representative of popular preferences. For example, a leading study shows that, at the state level, "[r]oughly half the time, opinion majorities lose—even large supermajorities prevail less than 60% of the time. In other words, state governments are on average no more effective in translating opinion majorities into public policy than a simple coin flip."<sup>22</sup> The problems of state democracy raise important questions about existing theories of federalism, such as: How many inventions do our "laboratories of democracy" actually create? How many different policy options do the fifty states provide to mobile residents? Our understanding of these theories would be well served by looking beyond the arguments at One First Street and into the elections that choose the people who run state governments in Albany and Richmond, in Columbus and Sacramento.

Part I of this Article analyzes the history of state legislative appointment of senators from the founding period to the enactment of the Seventeenth Amendment. Part II argues that changes in the centralization and ideological coherence of national political parties can help explain why there was little state-government-based opposition to the Seventeenth Amendment. Part III argues that the history of the Seventeenth Amendment has important implications for the literature on the political safeguards of federalism and on the study of federalism generally.

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*Safeguards of Federalism*, 100 COLUM. L. REV. 215, 269 (2000) [hereinafter Kramer, *Putting the Politics Back*] (same); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546, 558–59 (1954) (arguing that the structure of the federal government protects federalism).

22. See Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2012).



## I. APPOINTING VERSUS ELECTING SENATORS FROM THE FOUNDING PERIOD TO THE SEVENTEENTH AMENDMENT

This Part explores the history of arguments over methods of appointment for senators from the founding period through passage of the Seventeenth Amendment. As it will show, the existing literature has had difficulty explaining the rise of support for directly electing U.S. senators.

### A. THE FOUNDERS AND SENATORIAL APPOINTMENT

The Citizens of the States would be represented both *individually* and *collectively*.

—James Madison<sup>23</sup>

In order to understand what was missing from the debates over the Seventeenth Amendment, it is necessary to understand why the original Constitution gave state legislatures the power to appoint U.S. senators. In *The Federalist No. 62*, James Madison stated two reasons for giving state legislatures the power to appoint senators:

Among the various modes which might have been devised for constituting this branch of the government . . . [i]t is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.<sup>24</sup>

State legislatures were thus given the power to appoint senators for two reasons: to ensure “select” representation, and to protect the interests of the states. The former can be seen in many aspects of the design of the Senate, particularly its six-year terms.<sup>25</sup> The Founders justified their decision to give state legislatures the power to choose senators in part to remove the decision from mass democratic consideration and put the decision in elite hands.<sup>26</sup>

It is a mistake, however, to look at state legislative selection only as a means of insulating government from popular opinion. After all, the Constitutional Convention considered and rejected other possible ways of selecting the Senate that were equally removed from the popular vote, including having the House select the membership of the Senate.<sup>27</sup> The other side of the “double advantage” was also central to the decision. George Mason defended state legislative selection on the ground that

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23. JAMES MADISON, DEBATES OF THE ADOPTION OF THE FEDERAL CONSTITUTION 163 (Jonathan Elliot ed., 1845).

24. THE FEDERALIST No. 62, *supra* note 7, at 377.

25. See Zywicki, *Beyond the Shell*, *supra* note 2, at 180–82.

26. THE FEDERALIST No. 62, *supra* note 7, at 377.

27. Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 674 (1999) (noting that the Convention considered and rejected a resolution proposing that the members of the House select the Senate).

states needed the power of self-defense against the federal government.<sup>28</sup> The Senate was clearly seen as the protector of state interests.

But senators were not intended to serve as ambassadors of state governments either. The Convention rejected proposals that would have given state governments control over senators, including the power to recall senators or punish them for ignoring the instructions of state legislatures.<sup>29</sup> Senators from the same state were allowed to disagree, which is inconsistent with the idea that they served as agents of state governments. Further, the Constitution did not allow state governments as sovereign entities to decide how they would select senators; the power to appoint was explicitly delegated to state legislatures, who were seen as the bodies with the greatest democratic pedigree.<sup>30</sup>

Thus, State legislative selection of senators was not only a method of protecting states as entities; it was also a way to increase the *types* of representation afforded by the federal government to the people.<sup>31</sup> William Pierce, a delegate from Georgia, made this point at the Convention when he said that the division of bicameral legislature into national and federal bodies meant that “the Citizens of the States would be represented both *individually* and *collectively*.”<sup>32</sup> Bicameralism based on different sources of electoral accountability would also protect against dominance by one faction.<sup>33</sup>

These benefits were crucial in public justifications of senatorial appointment. In *Federalist No. 39*, Madison emphasized that both houses of Congress had democratic purchase, but of different sorts. He noted that the “House of Representatives . . . is elected immediately by the great body of the people. The Senate . . . derives its appointment indirectly from the people.”<sup>34</sup> Thus, both have democratic pedigree, if of a different sort. Then, he continued:

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28. GEORGE H. HAYNES, *AMERICAN PUBLIC PROBLEMS: THE ELECTION OF SENATORS* 13 (Ralph Curtis Ringwalt, ed., 1906) (quoting George Mason’s arguments for the popular election of senators).

29. See Kramer, *Understanding Federalism*, *supra* note 21, at 1508.

30. See U.S. Const. art. I, § 3, cl. 1 (amended 1913).

31. This understanding of the decision to have state legislatures select Senators clears up one seeming contradiction in the Framers’ beliefs about the Senate. See Kramer, *supra* note 29, at 1508 (“The Senate was designed to serve contradictory ends. On the one hand, it was supposed to protect states by giving state legislatures an effective veto over federal policy. On the other hand, it was also supposed to serve as a republican analogue to the aristocratic House of Lords by taking the longer, more ‘national’ view of policy.”). However, if one considers the Senate as providing a different form of representation, one in which through deliberation they came to the best interests of the nation as a compact between states, this seeming contradiction dissolves. That is, to the extent this understanding was common, there is no reason to think that representing state interests in a national legislature and having a long-sighted view of the national interest beyond day-to-day politics are in conflict.

32. See Zywicki, *Beyond the Shell*, *supra* note 2, at 177 (quoting Georgia Delegate Pierce’s statement during the debates); see also MADISON, *DEBATES*, *supra* note 23, at 163.

33. *Id.* at 175–79.

34. THE FEDERALIST No. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961).

The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is FEDERAL, not NATIONAL. . . . From this aspect of the government it appears to be of a mixed character, presenting at least as many FEDERAL as NATIONAL features.<sup>35</sup>

When combined with his earlier statement noting the democratic nature of both bodies, the meaning of Madison's argument becomes clear. Giving elected state legislatures the power to appoint senators and voters the power to select members of the House directly meant that the two houses of Congress would provide two different types of democratic representation: individual (as national citizens) in the House and collective (as citizens of a State) in the Senate.

In an important article, Terry Smith challenged the argument that state legislatures were intentionally given the power to select senators to give states control over the Senate.<sup>36</sup> Instead, Smith argues, it was the result of the intersection of two other debates: the Great Compromise, which gave small states equal representation in the Senate, and differences about the value of elite versus popular representation.<sup>37</sup> In fact, there was widespread disgust with the idea that states as entities would be given representation rather than citizens, including from Madison and Alexander Hamilton.<sup>38</sup> The design features of the Senate, from the ability of senators from the same state to vote differently to the absence of the power of states to recall senators, were inconsistent with the idea of a Senate that represented states. According to Smith, the Founders chose to have state legislatures select senators and later developed an explanation.<sup>39</sup>

Smith further argues that during the battles over ratification, the inconsistencies in the justification for state legislative election were laid bare.<sup>40</sup> The Federalists had to face claims by Anti-Federalists that the Constitution was inconsistent with state sovereignty because, by the understanding at the time, sovereignty was indivisible.<sup>41</sup> James Wilson, leading the campaign for the Constitution in Pennsylvania, instead argued that sovereignty "resides in the citizens," allowing for it to be represented

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35. *Id.* at 244.

36. Terry Smith, *Rediscovering the Sovereignty of the People: the Case for Senate Districts*, 75 N.C. L. REV. 1, 21-34 (1996).

37. *Id.* at 19-26.

38. *Id.* at 27.

39. *Id.* at 21-22.

40. *Id.* at 29.

41. *Id.* at 31.

in different forms at different levels of government.<sup>42</sup> Acceptance of this argument, Smith claims, nullified any argument that the Senate was an expression of state sovereignty. “The legislative appointment of federal Senators was not a mechanism for representing state legislatures in the Senate, for these entities did not in reality possess sovereign powers—only the people did.”<sup>43</sup>

Smith successfully undermines the notion that the Senate was intentionally designed exclusively as a means of protecting state sovereignty. But, as the arguments made by Madison and Wilson during ratification suggest,<sup>44</sup> one key proffered justification for allocating this power to state legislatures was providing representation to the people of each state in their capacity as state residents. There were no national political parties when the Constitution was written, and the idea of such parties was anathema to the Founders.<sup>45</sup> Instead, each state had its own political culture, local leaders, press, and social organizations. Thus, politics internal to each state could be, and were, quite different from politics at the national level. State legislatures represented a state’s political culture. Allocating the power to appoint senators to state legislatures meant that there would be two types of representation for citizens.

As with any such decision, many forces surely played a role in the decision to allocate power to choose senators to the state legislatures. However, three lessons can be drawn from the history of the original decision to give state legislatures the power to appoint U.S. senators that may help explain the debate over the Seventeenth Amendment. First, state legislative appointment was designed to ensure elite—and not purely popular—representation. Second, the Framers took seriously the benefits of using the Senate to provide representation for states in the federal government. Third, the decisions to give the power to state legislatures instead of the state as a whole, the absence of recall power, and the ability of senators from the same state to vote differently meant that senators were not seen as ambassadors of state governments. Instead, senators were meant to provide representation to citizens in their capacity as citizens of states, rather than just as citizens of the nation.

#### B. WHERE DID SUPPORT FOR DIRECT ELECTIONS COME FROM?

If the Senate was designed in part to protect state governments against federal encroachment and in part to provide an alternative means of representation for voters, it is a riddle why state election of senators

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42. *Id.* at 33.

43. *Id.*

44. *Id.* at 33–34.

45. See Kramer, *Putting the Politics Back*, *supra* note 21, at 269.

was abandoned overwhelmingly in 1913 without any real debate over the extent to which it would affect the role of states in the federal government. Traditional accounts of the history of the Seventeenth Amendment provide a number of explanations for its success, but none of them directly address the two most difficult questions about its passage: why direct election was so overwhelmingly popular in the state legislatures it disempowered and why there was so little discussion of how direct elections reduced state authority and power.

Before discussing the history of the Seventeenth Amendment, it is important to see how the Senate functioned during the eighteenth and nineteenth centuries. There is some dispute about the extent to which the Senate ever truly provided representation to citizens collectively or protected the interests of state governments. William Riker and Larry Kramer argue that the original set-up of the Senate strongly limited the degree to which senators served as representatives of states.<sup>46</sup> Once appointed, senators were largely independent of state legislatures because of their six-year terms and because state legislatures did not have the power of recall. Further, although state legislatures did have the power to “instruct” senators on specific votes, this power was restricted by their limited power to punish wayward senators and was phased out after abuse during the Jackson Administration.<sup>47</sup> According to Riker, the result was that having state legislatures select senators “did not . . . have quite the anticipated effect. Except for a few occasions when sectionalism has been organized by state governments, the Senate has not been a peripheralizing institution.”<sup>48</sup>

Todd Zywicki, on the other hand, while acknowledging the limitations created by the lack of the power of recall and the atrophying of the instruction power, argues:

Nonetheless, instruction and the remaining enforcement mechanisms such as refusal to reelect and forced resignations provided state legislatures with some measure of control over Senators. . . . [S]tatistical and anecdotal evidence suggests that the Senate played an active role in preserving the sovereignty and independent sphere of action of state governments.<sup>49</sup>

Regardless of the emphasis one puts on this evidence, it is clear that the Senate was not as robust an institution in protecting state interests as some Framers intended. But it is also clear that it was not a purely

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46. Kramer, *Understanding Federalism*, *supra* note 21, at 1506–10; William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 455–63 (1955).

47. Kramer, *Putting the Politics Back*, *supra* note 21, at 224 n.33; Kramer, *Understanding Federalism*, *supra* note 21, at 1508–09.

48. Riker, *supra* note 46, at 455.

49. Zywicki, *Beyond the Shell*, *supra* note 2, at 173–74.

national institution either. The question of why the original Senate was changed remains.

Scholars usually date the beginning of the national movement in favor of direct elections to the 1870s, when advocates introduced the first real efforts to amend the Constitution in Congress.<sup>50</sup> Others point to the rise of the “public canvass,” in which candidates for Senate, starting in the 1830s, would stump for state legislators, making state legislative elections into partial proxies for the popular support for the candidates.<sup>51</sup> The most famous example of the “public canvass” was the nationally followed Illinois Senate race of 1858, in which the state legislative election served as a proxy for the titanic battle between Abraham Lincoln and Stephen Douglas, with Democratic state legislative candidates pledging their support to Douglas and Republicans to Lincoln.<sup>52</sup> After the Civil War, President Andrew Johnson wrote that the arguments in favor of direct election of senators were so overwhelming that they barely needed explaining.<sup>53</sup>

Regardless of the exact beginning of the movement for direct elections, it is clear that it picked up rapidly during the mid-1870s, when members of Congress regularly began to file constitutional amendments to institute direct elections for senators.<sup>54</sup> Additionally, many states began adopting primary elections for senators, in which partisans could directly choose the candidate of their choice.<sup>55</sup> This, of course, did not create direct elections—whichever party won the state legislature would still have the power to choose its candidates. However, the public profile of Senate candidates meant that their popularity (or lack thereof) became increasingly important in state legislative elections.<sup>56</sup>

Around the turn of the century, state legislatures began to actively push for a constitutional amendment. Between 1890 and 1905, thirty-one of the forty-five state legislatures had passed resolutions either calling on Congress to pass an amendment providing for the direct election of senators, to hold a conference with other states to work on such an amendment, or to have a Constitutional Convention such that the direct

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50. See HAYNES, *supra* note 28, at 103 (noting that although amendments to change the form of senatorial appointment had been proposed in the 1820s and 1830s, the first real efforts to amend the Constitution to require direct election occurred in the 1870s); see also Zywicki, *Beyond the Shell*, *supra* note 2, at 174 (same).

51. See Riker, *supra* note 46, at 464.

52. See *id.* at 464–65.

53. See HAYNES, *supra* note 28, at 102.

54. See Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1976 (1994) (citing 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 96–97 (1938)).

55. *Id.* at 1977 (describing the rise of Senate party primaries and noting, where one party was dominant, like the solid Democratic South, that these functioned like direct elections).

56. See Riker, *supra* note 46, at 466.

elections could be included in a newly drawn Constitution.<sup>57</sup> They were aided by the popular press, which seized on the issue: William Randolph Hearst hired muckraking journalist David Graham Phillips to write a sensationalist exposé, "The Treason of the Senate," which attacked the appointed Senate as a club of corrupt millionaires.<sup>58</sup>

States also began to implement direct elections themselves through a clever mechanism that became known as the "Oregon system."<sup>59</sup> Under the Oregon system, state legislative candidates were required to state on the ballot whether they would abide by the results of a formally non-binding direct election for U.S. senator.<sup>60</sup> Almost all legislative candidates did so, fearing popular wrath if they did not, and followed the results once elected.<sup>61</sup> By 1908, twenty-eight of the forty-five states used the Oregon system or some other form of direct elections, some adopted through the initiative process and others through legislative action.<sup>62</sup>

In the House of Representatives, direct election of senators was nearly as popular. Amendments to the Constitution providing for direct election passed the House in each session between 1893 and 1912.<sup>63</sup> Hardliners in the Senate managed to fend off each of these efforts and were aided when the Amendment became linked with a highly controversial attempt by southern senators remove Congress's ability to pass voting rights legislation from the Elections Clause of Article I.<sup>64</sup> But in 1912, supporters of the Amendment severed the Amendment from the change to the Elections Clause, and the drumbeat of popular support ensured its passage.<sup>65</sup> The fear of a Constitutional Convention, which could have resulted in more dramatic changes to the Constitution, the

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57. See HAYNES, *supra* note 28, at 108–09.

58. Much later, the articles were republished in book form. See generally DAVID GRAHAM PHILLIPS, *THE TREASON OF THE SENATE* (George E. Mowry & Judson A. Grenier eds., 1964); see also Donald R. Matthews, 30 PUB. OPINION Q. 326, 326–27 (1966) (reviewing DAVID GRAHAM PHILLIPS, *THE TREASON OF THE SENATE* (1906)). Phillips's attack was so prominent that President Theodore Roosevelt devoted a major address to rebutting it. *Id.*

59. Kobach, *supra* note 54, at 1978 (describing the Oregon system).

60. *Id.*

61. *Id.*

62. *Id.* at 178–79.

63. See generally Sara Brandes Crook & John R. Hibbing, *A Not-So-Distant Mirror: The 17th Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845 (1997); see also Rossum, *supra* note 27, at 705–06 n.186.

64. The original draft of what would become the Seventeenth Amendment included a change to Article I, Section 4, the Elections Clause, that would have given states, and not the federal government, sole control over setting the time, place, and manner of Senate elections. See Smith, *supra* note 36, at 41–50. Southern Democrats, who were worried that the federal government might interfere with the exclusion of African Americans from voting, defended this proposed change on federalism grounds. But the Senate passed the so-called Bristow Amendment, which removed the part of the Seventeenth Amendment that would have changed the Elections Clause, before it was sent to the states. *Id.*

65. See Smith, *supra* note 36, at 53.

defeat of many senators opposed to direct election, and the overwhelming nature of popular opinion in favor of direct election led the Senate to send the Amendment to the states in 1912.<sup>66</sup> It took less than eleven months for three quarters of the states to ratify the Amendment, and it went into law in 1913.<sup>67</sup>

One particularly notable part of the debate in Congress and popular opinion over the Seventeenth Amendment was the absence of any discussion about the effect that weakening state control over the Senate might have for federalism. Ralph Rossum wrote:

The popular press, the party platforms, the state memorials, the House and Senate debates, and the state legislative debates during ratification focused almost exclusively on expanding democracy, eliminating political corruption, defeating elitism, and freeing the states from what they had come to regard as an onerous and difficult responsibility. Almost no one (not even among the opposition) paused to weigh the consequences of the Amendment on federalism.<sup>68</sup>

There were a few exceptions.<sup>69</sup> Notably, Senators Elihu Root and George Hoar gave several impassioned speeches about the effect of the Seventeenth Amendment on the constitutional system of federalism, quoting extensively from *The Federalist Papers* and the Constitutional Convention.<sup>70</sup> However, proponents of the Amendment did not justify their support on the grounds of national unity or centralization, but instead focused on other issues.<sup>71</sup> Root and Hoar's federalism-based defense did little and the Senate passed the Amendment.

This history leaves many questions: Where did the near-universal support for direct election of senators come from? Why was there no real opposition inside the state legislatures that the Amendment disempowered? Why was there virtually no discussion during the long debate over the Seventeenth Amendment of the harm it did to state governmental authority?

There are a number of reasons scholars usually give for the passage of the Seventeenth Amendment, most notably the rise of the Progressive movement and problems related to the specifics of state legislative selection, including unfilled senatorial seats and corruption in the selection of senators. A close look shows that each explanation has force, but none explain the aforementioned questions raised by the history of the Seventeenth Amendment.

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66. Zywicki, *Beyond the Shell*, *supra* note 2, at 176.

67. See, e.g., *17th Amendment to the U.S. Constitution: Direct Election of U.S. Senators*, NAT'L ARCHIVES, <http://www.archives.gov/legislative/features/17th-amendment> (last visited Apr. 24, 2014).

68. Rossum, *supra* note 27, at 711–12.

69. That is, exceptions in addition to the argument over the proposed change in the Elections Clause, which was debated largely on federalism grounds. See Bybee, *supra* note 2, at 544.

70. Rossum, *supra* note 27, at 713–14.

71. *Id.* at 714–15.



The traditional story is that the rise of the Progressive and Populist movements led to the passage of the Seventeenth Amendment. Much of the popular argument for the Amendment sounded in Progressive rhetoric: opposition to corrupt state legislatures bought by seedy business trusts and powerful party machines, dislike for corrupt “elite” representation, and extensive faith in the ability of the people to govern when impediments to their rule were removed.<sup>72</sup>

But revisionist scholars have persuasively shown that this story is, at very least, overly simplified.<sup>73</sup> While the Progressive and Populist proponents of direct elections were indeed prominent at the time of the Seventeenth Amendment, the claim that the Amendment’s success can be explained solely by their support is problematic. After all, despite other major successes in the electoral field (such as women’s suffrage, state constitutional amendments providing for initiatives, non-partisan elections and council-manager systems at the local level), the Seventeenth Amendment was the Progressives’ only success in reforming the structure of the federal government.<sup>74</sup> Other proposals for structural change at the federal level, like abolishing the Electoral College, made little or no headway.<sup>75</sup> Even at the state level, where Progressives were successful in passing major election reforms, they were largely unable to rally mass support for changes to the form of legislatures.<sup>76</sup> For instance, numerous Progressive proposals for unicameral legislatures in the states were defeated.<sup>77</sup> If nothing else, one must explain why this component of the Progressive agenda was more successful than others.

Moreover, merely pointing to the broader success of the Progressive movement does not explain the breadth of support for the Seventeenth Amendment. Urban political machines, usually opponents of “goo-goo”

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72. See HAYNES, *supra* note 28, at 153–210 (a contemporary summary of the arguments in favor of direct election); Zywicki, *Beyond the Shell*, *supra* note 2, at 185–86 (noting that the conventional wisdom on the Seventeenth Amendment is to credit the Progressive movement).

73. See Zywicki, *Beyond the Shell*, *supra* note 2, at 184–95; Bybee, *supra* note 2, at 538–45.

74. Thomas E. Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 11 (2000) (noting the support of the Progressives for the Nineteenth Amendment, which provided for female suffrage); Zywicki, *Beyond the Shell*, *supra* note 2, at 194 (noting Progressive support for recall and referenda at the state level); Schleicher, *City Council Elections*, *supra* note 19, at 465–67 (describing Progressive support for non-partisan elections and council manager systems).

75. See Zywicki, *Beyond the Shell*, *supra* note 2, at 194–95.

76. See John Dinan, *Framing a “People’s Government”: State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 963–64 (1999) (footnotes omitted) (“As a result, although the various alternatives to the traditional bicameral arrangement attracted a fair amount of support in several of the state conventions, and came within a single vote of being approved by the Nebraska Convention, none of these proposals was ultimately adopted, at least during the Progressive era. It was not until 1935 that Nebraska became the first and only state to enact a unicameral system, through an initiative procedure.”).

77. *Id.*

Progressives, also supported direct election.<sup>78</sup> Direct elections also attracted support from big business interests, which either had an oppositional or ambivalent relationship with the Progressive and Populist movements.<sup>79</sup>

Most importantly, a story built around the rise of the Progressive movement cannot explain the absence of state-based opposition. This was, after all, the era of Jim Crow and states, particularly southern ones, resisted other intrusions on the scope of their power.<sup>80</sup> Most Southern legislatures had passed resolutions calling on Congress to pass a constitutional amendment providing for direct elections well before it did so.<sup>81</sup> State voters can achieve policy ends only by acting through state legislatures. Groups of voters that regularly won state legislative elections, and influential interest groups inside state legislatures, were in a position to reject direct elections. Any persuasive theory of why the Seventeenth Amendment passed needs to explain why voters, interest groups, and politicians who were winning at the state level, and thus had the power to appoint U.S. senators, decided to give this power away and use an alternate method in which their influence would be less certain. Although the Progressives and Populists—strong political forces in the early twentieth century—pushed for the Seventeenth Amendment, their influence alone cannot explain the overwhelming popular and political support for the direct election of senators.

Explanations rooted in the specifics of the practice of the state legislatures face similar problems. Two common arguments during the debates over direct election were that state legislatures were corrupt in their selection of senators and that deadlocks in state legislatures resulted in unfilled senatorial seats.<sup>82</sup> Deadlocks could persist because an 1866 federal law required the votes of a majority, and not merely a

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78. See RICHARD HOFSTATDER, *THE AGE OF REFORM* 254 (1955) (“If big business was the ultimate enemy of the Progressive, his proximate enemy was the political machine.”). See generally John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305 (1969) (describing urban political machine support for the Seventeenth Amendment).

79. See HOFSTATDER, *supra* note 78, at 254 (noting opposition between big business and the Progressive movement); Smith, *supra* note 36, at 66 n.328 (describing business support for the Seventeenth Amendment); Zywicki, *Beyond the Shell*, *supra* note 2, at 185 (arguing that the Progressive movement was not opposed to business interests).

80. See, e.g., James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1009 (2003) (“Trust in state governments enjoyed a resurgence during the late Nineteenth Century, particularly after public opinion turned against the northern occupation of the South and the Union programs of Reconstruction.”); FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876*, at 208–23 (2000) (“[During this period] attempts to encroach upon the powers reserved to the states were struck down by the Supreme Court and were disapproved by the vast majority of Americans.”).

81. See HAYNES, *supra* note 28, at 108.

82. See Bybee, *supra* note 2, at 539–43.

plurality, of state legislators to elect a senator.<sup>83</sup> Although these arguments were certainly a large part of the campaign by proponents of direct election, they do not fully explain how the Seventeenth Amendment passed. While there was certainly some corruption in selecting senators, politics is never free of the stench of the improper, and there needs to be an explanation for why of all sources of corruption, reformers targeted local election of for elimination by constitutional amendment.<sup>84</sup> Also, the alleged sources of that corruption—business groups powerful at the state level and political machines—were key supporters of direct elections. If these groups had the power to sneak through senators over popular worry about corruption, there needs to be an additional explanation for why they did not have enough power to stop direct elections—and in fact did not want too. Deadlock as an explanation is particularly odd because there were not that many seats left unfilled;<sup>85</sup> those empty seats resulted from a change in federal law that could have easily been changed back without amending the Constitution.

Leading revisionist scholar Todd Zywicki uses the “tools of public choice” to explain the passage of the Seventeenth Amendment.<sup>86</sup> Zywicki argues that the Amendment passed due to lobbying by national special interest groups, ranging from business trusts to unions.<sup>87</sup> These groups, he claims, supported the Amendment for several reasons: it would reduce the cost of lobbying for favorable legislation by national interest groups because lobbyists would only have to engage with one body and not fifty;<sup>88</sup> it would increase the length of senatorial tenures, permitting interest groups to form long-term relationships with senators;<sup>89</sup> and it would reduce monitoring of senators because state legislatures were better at ensuring that senators did the bidding of the voting public

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83. See *Election Laws*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/contested\\_elections/election\\_laws.htm](http://www.senate.gov/artandhistory/history/common/contested_elections/election_laws.htm) (last visited Apr. 24, 2014) (discussing the 1866 Act and the resulting election delays).

84. Also, there are substantial questions about how much actual corruption there was. Bybee, *supra* note 2, at 539 (“Between 1857 and 1900, the Senate investigated ten cases of alleged bribery or corruption, although in only three cases was a Senate committee able to conclude that the charges had merit.”).

85. *Id.* at 542 (“Between 1891 and 1905, eight state legislatures failed to elect senators and were without full representation from periods of ten months to four years.”).

86. Zywicki makes these claims over the course of two articles: Zywicki, *Beyond the Shell*, *supra* note 2, and Zywicki, *Senators and Special Interests*, *supra* note 2. While there is much debate about how to define public choice, the simplest and most encompassing definition was given Dennis Mueller: “The economic study of non-market decision making, or simply the application of economics to political science.” DENNIS MUELLER, *PUBLIC CHOICE II*, at 1 (1989).

87. Zywicki, *Beyond the Shell*, *supra* note 2, at 216; Zywicki, *Senators and Special Interests*, *supra* note 2, at 1039, 1054.

88. Zywicki, *Beyond the Shell*, *supra* note 2, at 215–17; Zywicki, *Senators and Special Interests*, *supra* note 2, at 1032–33, 1040–41.

89. Zywicki, *Senators and Special Interests*, *supra* note 2, at 1048–49, 1052.

rather than special interest groups.<sup>90</sup> National interest groups thus had an interest in direct elections because it made the Senate easier to lobby.<sup>91</sup>

These claims provide interesting arguments for why certain interest groups might have supported the Amendment when it was proposed in Congress. But there are reasons to be skeptical that Zywicki's argument can explain what is really perplexing about the history of the Amendment.

To start, it is difficult to understand why any one interest group would expend substantial resources on a structural constitutional issue as a lobbying strategy. Even if the Seventeenth Amendment benefited all national interest groups, each interest should have faced a collective action problem counseling against spending resources in favor of this type of constitutional change that would benefit all national interests equally.<sup>92</sup> More pressingly, even if Zywicki is correct about the incentives of national businesses and political interests, the increased nationalization of politics would surely create losers as well as winners. According to Zywicki, those who were harmed by the Seventeenth Amendment—such as state-based businesses, rural interests who benefited from unequally sized districts in the state legislature—should have been *relatively* more powerful inside state legislatures. Their influence with state legislatures is exactly what would have made them lose out as a result of the passage of the Seventeenth Amendment. If Zywicki's is correct, the last holdouts against the Seventeenth Amendment should have been resistant state legislatures, but the opposite is true. State legislatures and state branches of the national political parties *led* the fight for direct election. There is nothing in the historical record that reveals national interest groups becoming newly and heavily involved in state legislative debates over the subject.

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90. Zywicki, *Beyond the Shell*, *supra* note 2, at 207–09; Zywicki, *Senators and Special Interests*, *supra* note 2, at 1041–42.

91. Zywicki also argues that Western states, who had already implemented direct elections, had an interest in passing the Seventeenth Amendment because Eastern states had long-serving senators and introducing popular elections might remove these senators, opening up committee and leadership positions for Western senators. See Zywicki, *Senators and Special Interests*, *supra* note 2, at 1048. While this may have played a role, support for direct election was national. Support in Eastern states like Pennsylvania, Maine, and New Jersey was strong enough for their state legislatures to call for a Constitutional Convention in order to pass an amendment in favor of the direct election of senators. There were also calls for a convention in Midwestern states like Illinois, Minnesota, Ohio, and Wisconsin, and Southern states like North Carolina, Arkansas, Tennessee, Missouri, Kentucky, and Texas. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 764–89 (1993). All Eastern states with the exception of Rhode Island, which never voted, ratified the Seventeenth Amendment. One Western state, Utah, voted not to ratify. All of the rest of the non-ratifying states were either Southern or border states. See Rossum, *supra* note 27, at 711.

92. See Zywicki, *Senators and Special Interests*, *supra* note 2, at 1054 (acknowledging that there is no evidence of lobbying by particular interest groups).

Thus, the most significant problem with the revisionist take on the Seventeenth Amendment is one it shares with the mainstream history it challenges. Neither can explain the *absence* of opposition among the state legislatures, state-based interest groups, and successful state political groups that it disempowered.

Although success in politics is often either over- or under-determined and has a degree of randomness, existing explanations are just not up to the task of explaining why the movement for direct elections succeeded.

## II. WHY WAS THERE NO STATE-BASED OPPOSITION TO THE SEVENTEENTH AMENDMENT? NATIONAL POLITICAL PARTIES AND STATE DEMOCRACY

Extant explanations of the passage of the Seventeenth Amendment have one common feature—they look at who supported the Amendment and why. This is only half of the story. The more interesting part is why there was not opposition to the direct election of senators among state officials and interest groups powerful in state legislatures who were losing power. This Part argues that the lack of opposition can be explained in part by changes in the political party system.

### A. A BRIEF HISTORY OF POLITICAL PARTIES FROM THE CIVIL WAR TO THE SEVENTEENTH AMENDMENT

It is necessary to go through a (too) quick history of American political parties in order to recount this tale. By the mid-1830s until the run-up to the Civil War, and then again after the War, American politics had the rough outlines of a two-party system.<sup>93</sup> Voting was largely partisan, but non-ideological, with loyalty to state and local parties based on ethnic and cultural ties.<sup>94</sup> State parties dominated newspapers, campaigning, and the distribution of ballots.<sup>95</sup>

After the Civil War, the two-party system became far stronger. The number of votes for independents dropped dramatically, except for one last gasp in the early 1870s.<sup>96</sup> Further, parties—both the two major parties and a few minor parties, especially the emerging Populists—

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93. See RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 162–81 (1986); William Shade, *Political Pluralism and Party Development: The Creation of a Modern Party System, 1815–1852*, in *THE EVOLUTION OF AMERICAN PARTY SYSTEMS* 77, 103–04 (Paul Kleppner et al. eds., 1965).

94. See PRADEEP CHHIBBER & KEN KOLLMAN, *THE FORMATION OF NATIONAL PARTY SYSTEMS: FEDERALISM AND PARTY COMPETITION IN CANADA, GREAT BRITAIN, INDIA, AND THE UNITED STATES* 209–10 (2004); PAUL KLEPPNER, *WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT, 1870–1980*, at 47 (1982) (“Above all, politics was *party* politics.”).

95. See CHHIBBER & KOLLMAN, *supra* note 94, at 210–11; MCCORMICK, *supra* note 93, at 164–66, 172–73, 179, 201.

96. CHHIBBER & KOLLMAN, *supra* note 94, at 166–73.

became more national.<sup>97</sup> Pradeep Chhibber and Ken Kollman created a figure, “party aggregation,” which measures how national a party system is. Party aggregation is calculated by determining the difference between the numbers of parties competitive nationally and the average number of parties competitive in each district.<sup>98</sup> In a fully aggregated system, every party that was competitive in any congressional election would also be competitive in all other congressional races. That is, if the system is fully aggregated, there would be no state- or district-specific parties or candidates.

Outside of two elections with small spikes in the early 1890s and in 1912 (after the passage of the Seventeenth Amendment), the party system was fully aggregated after 1870.<sup>99</sup> Further, national political parties won a high percentage of the vote in each congressional election between 1876 and 1912, except for 1894.<sup>100</sup>

The key turning point, Chhibber and Kollman note, occurred in the 1870s.<sup>101</sup> For most of the nineteenth century, the national parties were in many ways coalitions.<sup>102</sup> Rather than having one name and organizational structure, the national parties were composed of groups from each state that did not run candidates against one another but were formally and organizationally separate.<sup>103</sup> After the 1870s, the parties unified and “stamped out the proliferation of labels and both coalesced under singular labels.”<sup>104</sup> Party was also increasingly the key determinant of legislative behavior in Congress. Party line voting increased substantially between 1876 and 1894.<sup>105</sup>

Why the parties began to nationalize is a difficult question. Based on comparative research in the United States, India, Canada, and Britain, Chhibber and Kollman argue that parties nationalize following the centralization of political power.<sup>106</sup> That is, as power moves from states or provinces to the federal government, party structure follows. “As policy-making authority migrates towards higher levels of government, voters will be more inclined to choose candidates who adopt party labels at broader levels of aggregations.”<sup>107</sup> However, after a great deal of

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97. *Id.* at 210.

98. They ran the same test against the number of competitive parties at the state level and the data shows an identical narrowing. CHHIBBER & KOLLMAN, *supra* note 94, at 169.

99. “[P]arty aggregation in the United States has been relatively successful since the 1870s. It blips upward several times during the 1890s and the 1910s, but is quite low otherwise.” *Id.* at 173, 166–69.

100. *Id.* at 170.

101. *Id.* at 211.

102. *Id.*

103. *Id.* at 208–16.

104. *Id.* at 215.

105. Paul Kleppner, *Partisanship and Ethnoreligious Conflict: The Third Electoral System, 1853–1892*, in *THE EVOLUTION OF AMERICAN PARTY SYSTEMS* 114, 139 (Paul Kleppner et al. eds., 1965).

106. See CHHIBBER & KOLLMAN, *supra* note 94, at 21.

107. *Id.*

centralizing during the Civil War, the period in question here—roughly the 1870s to 1913—centralizing and decentralizing forces were both in play.<sup>108</sup> Chhibber and Kollman describe this as an “ambiguous” period.<sup>109</sup> However, the parties continued the trend toward national aggregation throughout the period.<sup>110</sup>

Although it is difficult to explain why parties aggregated as much as they did during this period, it is easy to see a temporal connection between this aggregation and the movement for the direct election of senators. Despite furious battles about state rights in other policy areas, this is when the campaign for the Seventeenth Amendment took off.<sup>111</sup> Through the late 1870s and 1880s, groups agitated for direct election, proposing constitutional amendments, and pushing for party primaries and direct election substitutes on the state level.<sup>112</sup> However, as the movement built, a major political event happened: the realignment of 1896.<sup>113</sup>

Although party organizations began to nationalize, state branches of parties retained differentiated local flavors through the 1870s and 1880s.<sup>114</sup> Voter turnout during this period was extremely high—the highest in American history—and strong ethno-cultural-religious links between groups and parties made politics fierce, competitive, and stable, with voters consistently supporting the same party election to election.<sup>115</sup> “[L]ate nineteenth century parties [were] strongholds of localist resistance to political centralization.”<sup>116</sup> National parties were unable to provide support for (or against) cross-sectional and cross-societal national policy programs because their bases of political support differed from state to state. That is, the national parties were not ideologically defined. Democrats from New York shared little in common with Democrats from Ohio or South Carolina. Thus, despite becoming national in scope, the parties remained coalitions of distinct state-based institutions.

This changed in the 1890s. Political scientists have debated endlessly how to define the term “realignment” and whether the major change in the American political system happened in 1894 as a result of the Panic of 1893 or in 1896 as a result of the Presidential campaign between Republican William McKinley and Democrat William Jennings Bryan.<sup>117</sup>

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108. *See id.* at 156.

109. *Id.* at 156–60.

110. *Id.*

111. *See supra* notes 53–63 and accompanying text.

112. *Id.*

113. *See infra* note 118 and accompanying text.

114. Kleppner, *Partisanship and Ethnoreligious Conflict*, *supra* note 105, at 140.

115. *Id.* at 124.

116. *Id.* at 140.

117. William Schneider describes the timing and existence of realignments as “The Eternal Question.” *See* William Schneider, *Realignment: The Eternal Question*, 15 PS: POL. SCI. & POL. 449 (1982). All discussion of realigning elections begins with V.O. Key’s work. *See* V.O. Key, *A Theory of*

Regardless, at some point in the mid-1890s, American politics changed dramatically. Republicans gained an advantage they would hold until 1912.<sup>118</sup> Importantly, party support became heavily regional. Republicans dominated the populous Northeast, industrial Midwest, and most of the West Coast, while Democrats controlled the South and competed strongly in the interior West.<sup>119</sup> Third parties nearly died out as effective national forces. The Senate had twelve third-party members in the late 1890s but did not have a single one after 1903.<sup>120</sup> Few third-party members were elected to the House either.<sup>121</sup>

After 1896, Congress became highly professionalized, with each party having a strong whip organization to line up votes and control committee assignment, resulting in a high degree of cohesiveness in party voting, at least until the very end of this period.<sup>122</sup> This high degree of cohesiveness was driven by ideology: the parties became far more programmatically coherent. “[T]he 1896 realignment . . . was the result of cross-cutting issues that polarized the parties.”<sup>123</sup> Debate inside parties was also largely national and regional, not state-specific, with each party’s Progressive movement challenging party regulars across the country.<sup>124</sup> After 1896, the parties were more ideologically consistent.

At the same time, politics became less based on popular rallies and organization, and became more media driven.<sup>125</sup> This is easiest to see in the famous difference between William McKinley victoriously campaigning from his back porch, a model of the new style of parties, and William Jennings Bryan attending old-time religion mass rallies.<sup>126</sup> The parties’ responses to the Depression of 1893—free silver for the

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*Critical Elections*, 17 J. POL. I, 18 (1955). For a debate over the date of the beginning of the realignment of 1896, compare WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRING OF AMERICAN POLITICS* 38 (1970), with JAMES SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 156 (1983).

118. Walter Dean Burnham, *The System of 1896*, in *THE EVOLUTION OF AMERICAN PARTY SYSTEMS* 147, 171–83 (Paul Kleppner et al. eds., 1965).

119. Joel Budgor et al., *The 1896 Elections and Congressional Modernization: An Appraisal of the Evidence*, 5 SOC. SCI. HIST. 53, 54 (1981); Burnham, *The System of 1896*, *supra* note 118, at 171–75.

120. *Id.*

121. *Party Division in the Senate, 1789 to Today*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_tasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_tasers/partydiv.htm) (last visited Apr. 24, 2014); CHIBBER & KOLLMAN, *supra* note 94, at 166.

122. See David Brady et al., *Heterogeneous Parties and Political Organization: The U.S. Senate, 1880–1920*, 14 LEGIS. STUD. Q. 205, 206 (1989).

123. David Brady & Joseph Stewart, *Congressional Party Realignment and Transformations of Public Policy*, 26 AM. J. POL. SCI. 333, 352 (1982).

124. Howard L. Reiter, *The Bases of Progressivism Within the Major Parties: Evidence from the National Conventions*, 22 SOC. SCI. HIST. 83, 86 (1998).

125. *Id.*

126. *Presidential Elections 1896–1996: 1896: William McKinley v. William Jennings Bryan*, N.Y. TIMES, <http://www.nytimes.com/learning/general/specials/elections/1896/index.html> (last visited Apr. 24, 2014).



Bryanite Democrats, tariffs and support for industry for Republicans—led not only to massive regionalization, but also to reorganization of politics in the states.<sup>127</sup> The ethno-cultural-religious links between groups and parties in the pre-1896 era fell away.<sup>128</sup> Turnout, which reached its apex right before the realignment, collapsed as a result of the decline in competitiveness in many states and the breakdown of the ethno-cultural links between groups and parties.<sup>129</sup> Reforms, such as the introduction of primary elections and the secret “Australian” ballot, reduced the import of state party organizations.<sup>130</sup> The political parties of the turn of the century were substantially less programmatic and centralized than today’s parties, but they were far more programmatic and centralized than they had been prior to 1896.

B. WHY THE NATIONALIZATION OF POLITICAL PARTIES MATTERED: VOTER BEHAVIOR AND POLITICAL PARTIES

The timing of the nationalization of political parties lined up almost exactly with the movement for direct elections. As the parties began to centralize their operations and develop ideological programs, the states began their push for direct elections. This Subpart argues that there are strong theoretical reasons to think that the centralization and newly found ideological character of national parties depressed opposition to direct elections in state legislatures. This Subpart shows that, all else equal, stronger national parties should mean that national politics plays a bigger role in state elections, leaving state officials and state-centric interest groups with less control over their political destinies. To the extent that groups dominant in state legislatures felt that the role of national elections increased the risk that they might lose, they should have been more likely to support changes that would have separated state and national politics.

Parties play a particular role in the life of a democracy. Voters have little information about individual candidates and little reason to learn

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127. See KLEPPNER, *WHO VOTED?*, *supra* note 94, at 73–82.

128. *Id.* at 55 (“The realignment of 1894–96 altered the political conditions that had driven late-nineteenth-century electoral participation. It reduced partisan competition in most areas of the country. In the nation’s urban-industrial Metropole, it displaced the earlier congruence between social cleavages and party oppositions. The coalitional agreements created by the ‘System of 1896’ eroded the older linkages among group subcultures, partisan identification, and turnout rates, without replacing them with any new bases for social-group reinforcement. . . . The result was a participating electorate that was considerably shrunken in size from its late-nineteenth-century level, and one that more nearly approximated our own in its internal patterns of stratification by age cohorts and economic status.”).

129. *Id.* at 33.

130. *Id.* at 58–59.

such information.<sup>131</sup> Political party labels provide the information voters need in order for elections to serve their intended purpose of ensuring representation and accountability.

Party labels help voters in a number of ways.<sup>132</sup> To the extent that party labels accurately describe the ideological commitments of candidates running under their banner, voters only have to learn the meaning of the party label rather than the positions and histories of the numerous individual candidates on the ballot.<sup>133</sup> To the extent that the incumbent represents one party, voters do not need to rely on what politicians say, but rather can review how government has performed. If parties are ideologically consistent over time, voters can use their observations to develop “running tallies” (in Morris Fiorina’s famous turn of phrase),<sup>134</sup> allowing them to recall policies and practices they noticed and liked about each party and use their observations to inform their vote. These “running tallies” allow voters to vote roughly as if they were informed even if they do not know much about the candidates or relevant issues.<sup>135</sup> Further, the party label appears on the ballot, unlike interest group endorsements, meaning that it is easy (or easier) to link observations about the world to the actual voting decision. And because aggregate performance is a better indicator of future behavior than individual performance, the overall electorate can behave rationally and responsively on what political scientists call a “macropartisan” level even if many or most voters are ignorant of basic political facts.<sup>136</sup>

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131. See Elmendorf & Schleicher, *supra* note 19, at 371–72 (discussing work by Anthony Downs and Joseph Schumpeter on why there is no instrumental reason to become informed about politics and summarizing research on actual voter knowledge); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 75–93 (1996) (summarizing data on voter knowledge). To be fair, the information about voters’ political knowledge is based on survey data that does not cover the period in question, but given the consistently weak individual incentives to become truly informed, there is little reason to believe voters in the 1880s were different in this respect from voters today.

132. The following paragraphs are a very short version of the lengthy literature review in Elmendorf & Schleicher, *supra* note 19, at 370–85 (summarizing research).

133. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 112–15 (1960) (showing how party labels can allow voting even under low information).

134. MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 89–106 (1981).

135. *Id.*

136. See Elmendorf & Schleicher, *supra* note 19, at 378 (“Finally, much revisionist work has centered on the aggregate competence of the electorate. Benjamin Page and Robert Shapiro pointed out that bits of information that register with a few voters will nonetheless move mass opinion so long as unobservant voters stay constant in their views, or shift their views in some random, uncorrelated fashion. Moreover, the famed Condorcet Jury Theorem shows that a mass of individuals each of whom has only a slightly better than fifty-fifty chance of getting the right answer to a question will collectively get the answer right almost one hundred percent of the time, so long as the individuals act independently of one another. This has become known as the miracle of aggregation: acting together, even barely informed individuals can function as a well-informed collective.”). See generally ROBERT S. ERIKSON ET AL., THE MACRO POLITY (2002) (finding that voters allocate responsibility to parties in ways that are rational in aggregate, which they call “macropartisanship”).

The capacity of the electorate to develop running tallies about political parties affects the behavior of individuals in office. If the parties are competitive, then they have incentives to cater to the preferences of the median voter.<sup>137</sup> And if they are long-lived, parties have incentives to perform well in order not to sully their reputation.<sup>138</sup> Well-functioning parties, thus, help even a largely uninformed electorate to use elections for their intended purpose: producing responsive and accountable government.<sup>139</sup>

One need not overstate this case. Many voters have relationships with political parties that are more social or affective than ideological. Membership in a party can be handed down from parents to children or across social groups, preceding preferences about governance and serving as a “perceptual screen” for thinking about politics.<sup>140</sup> That is, many become Democrats or Republicans and then adopt policy views to fit the preferences of co-partisans.<sup>141</sup> Even policy-minded voters are frequently myopic, caring too much about events that occur right before an election. Voters also have trouble assigning functional responsibility to office holders and frequently take into account facts about the world, from shark attacks to college football results, which are clearly outside the control of the people on the ballot.<sup>142</sup> But virtually everyone who studies elections agrees that party labels are important tools—and almost

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137. See DOWNS, *supra* note 133, at 105–12.

138. See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA* 49–50 (1995).

139. That competition provides an incentive for officials to cater to the median voter does not necessarily mean that the results will necessarily equal the preferences of the median voter. For instance, an influential—and quite convincing—line in modern scholarship on political parties suggests that party policy is driven by “intense policy demanders” inside parties, largely activists and interest groups. In these models, inter-party competition and interest in the long-term value of the party brand act as a constraint on the policies these intense demanders can influence party officials to adopt, rather than an independent incentive for incumbents seeking re-election and office seekers to cater to median-voter preferences as it appears in Downs. See generally Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *PERSP. ON POL.* 571 (2012).

140. This theory was famously developed in ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* 120–41 (1960).

141. More accurately, almost all voters do this to some extent, but vary in how affective and how rational their party identification is. See Elemendorf & Schleicher, *supra* note 19, at 402.

142. *Id.* at 378–81; Christopher H. Achen & Larry M. Bartels, *It Feels Like We’re Thinking: The Rationalizing Voter and Electoral Democracy* (Princeton Univ., Working Paper, 2006), available at <http://www.princeton.edu/~bartels/thinking.pdf> (explaining biased perceptions and presented at the Annual Meeting of the American Political Science Association); Larry M. Bartels & Christopher Achen, *Blind Retrospection: Electoral Responses to Drought, Flu, and Shark Attacks* (Vanderbilt Univ., Working Paper No. 5-2013, 2009), available at [https://my.vanderbilt.edu/larrybartels/files/2011/12/CSDI\\_WP\\_05-2013.pdf](https://my.vanderbilt.edu/larrybartels/files/2011/12/CSDI_WP_05-2013.pdf) (discussing how irrelevant facts influence elections and presented at the Center for the Study of Democratic Institutions); Andrew J. Healy, Neil Malhotra & Cecilia H. Mo, *Personal Emotions and Political Decision Making: Implications for Voter Competence* (Stanford Graduate Sch. of Bus. Research, Paper No. 2034, 2009), available at [https://gsbapps.stanford.edu/researchpapers/detail1.asp?Document\\_ID=3269](https://gsbapps.stanford.edu/researchpapers/detail1.asp?Document_ID=3269) (discussing the influence of sporting results on elections).

certainly the most important tools—uninformed voters have to ensure that elections promote responsive and accountable governance.<sup>143</sup>

However, the value of a party label is better thought of as a variable than a constant. Party labels are less and more descriptive of candidates' beliefs at different times.<sup>144</sup> Further, party labels that are accurate at one level can be barely descriptive at other levels. Seeing that a candidate for the House of Representatives is a Democrat or Republican in today's heavily polarized Congress will tell the voter almost everything she needs to know about the candidate's future voting record.<sup>145</sup> In contrast, finding out whether a candidate for city council in most big cities is a Democrat or Republican will tell you very little; local parties rarely take consistent stands on local issues.<sup>146</sup> However, the quality of the information expressed by the party label does not determine the likelihood of that information being used, even by rational voters. For instance, voters in local elections rely on party labels heavily, even though they are weakly descriptive on a candidate's stances, because most voters have little knowledge about the policies and performance of city council members.<sup>147</sup> Democrats dominate national elections in big cities, which translates directly into dominating local legislatures, even though preferences on national and local issues are only weakly correlated.<sup>148</sup>

European political scientists have given a name to this type of election—"second-order elections."<sup>149</sup> When an election at one level of government turns on voter preferences on performance and policies at another level, it is second order. The classic example of this is elections for the European Parliament. These elections choose officials who make European Union policy, but their results turn entirely on the popularity of Prime Ministers in each European country.<sup>150</sup> As discussed more in Part III, second-order elections can be a result of election laws that promote "mismatch," or the use on local or supranational ballots of party

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143. See Schleicher, *What if Europe*, *supra* note 19, at 143–44 (reviewing literature).

144. Elmendorf & Schleicher, *supra* note 19, at 384.

145. *Id.* at 405, 421.

146. Schleicher, *City Council Elections*, *supra* note 19, at 440–47; Cheryl Boudreau et al., *Lost in Space?: How Endorsements Affect Spatial Voting in Low-Information Elections* (Univ. Cal. Davis Research, Paper No. 328, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2232371](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232371) (presented at the 2012 Conference of the Midwest Political Science Association).

147. *Id.*

148. *Id.*

149. See generally Karl H. Reif & Hermann Schmitt, *Nine Second-Order National Elections: A Conceptual Framework for the Analysis of European Election Results*, 8 EUR. J. POL. RES. 3 (1980).

150. See *id.*; SIMON HIX, WHAT'S WRONG WITH THE EUROPEAN UNION AND HOW TO FIX IT 80–84 (2008) (discussing European Parliament elections as second-order elections); Schleicher, *What if Europe*, *supra* note 19, at 119–30 (same).

labels defined at the national level, and inhibit the development of differentiated brands for each level of government.<sup>151</sup>

We see this phenomenon in elections for offices like European Parliament or City Council, where there is no formal link between the activities of officials at each level. But formal ties between levels of government—like giving state legislatures the power to appoint senators—should *increase* the likelihood that elections at the lower level of government will be second order. If you know a vote for one party's candidate for state legislature will have a desired effect on national politics, but do not know its effect on state politics, basing your vote entirely on national issues is perfectly rational.

The changes in political parties that started in the late 1870s and took off after 1896 affected the meaning and utility of party labels. The party labels increasingly described national political coalitions and differences in ideology about what the national government should do.<sup>152</sup> As the party labels became more accurate in describing how senators would vote on national issues, it increasingly became more reasonable for voters to use this label to determine their voting patterns in state legislative elections if they wanted to achieve national level policy changes, or to hold national parties accountable for their performance. That is, clearer party labels made it increasingly possible for state voters to use state legislative elections to influence national politics. The change in the meaning of party labels, thus, should have a direct relation to the degree to which preferences about national issues—such as tariffs, the Spanish-American War, and antitrust—determined voting patterns in state legislative elections.<sup>153</sup>

State elections, particularly in an era of “dual federalism” like the period during the run-up to the Seventeenth Amendment, theoretically should have turned on different issues than national elections, as the functional responsibilities of each were quite different.<sup>154</sup> Further, state elections should serve as referenda on the performance of state officials and state government. But if the information made available to generally uninformed voters through party labels increasingly tracks national politics and not the stances and performance of state politicians on state

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151. Elmendorf & Schleicher, *supra* note 19, at 394–408; Schleicher, *What if Europe*, *supra* note 19, at 119–30; Schleicher, *City Council Elections*, *supra* note 19, at 453–57.

152. See *supra* notes 116–127 and accompanying text.

153. This is perhaps better seen as a discussion of the utility of party labels on accountability rather than representation. As parties described national coalitions more accurately before the Seventeenth Amendment, it became more reasonable for voters to use state legislative elections to hold the party in power at the national level accountable for its performance in office because world events—such as the tariff rate or unemployment rate—were more easily attributed to all officials of that party.

154. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950) (describing the existence and fall of dual federalism).

issues, and state officials choose national officers, state elections should track national results.

This is even true for voters who care more about state issues than national ones. It is a relatively safe assumption that turn-of-the-last-century voters were without much information about individual candidates for state legislature and that party labels provided them with their most (and probably only) useful tool for figuring out how to vote in state legislative elections on ideological grounds. Unless state parties create state-specific brands in voters' minds, state-motivated voters will use their national preferences in state elections if that information is conveyed by the party labels.<sup>155</sup> The reason is that there is likely some correlation between national and state political preferences. In the absence of other information, it makes sense to rely on even weak heuristics.<sup>156</sup> As party labels increasingly described national political commitments rather than state-based ethno-religious coalitions, the degree to which national issues determined the votes of state-minded voters likely increased, as these voters relied on party labels in the absence of any other means of determining their vote in state elections.

The theory that changes in party organization and meaning had a causal effect on the degree to which state legislative voting tracked state issues and assessments of the performance of state officials rather than national ones is not the only theory consistent with the facts. Another possibility is that changes in party structure were epiphenomenal and the real cause of changes in party and state legislative voting patterns was the increased nationalization of the government and/or the economy. One could argue that, as the government and economy became more national, there was greater incentive among legislators to form ideologically coherent parties *and* state voters had greater reason to use state legislative elections to determine Senate races rather than state policy. This cannot be ruled out, although it is worth noting that throughout the period there was also a strong push for decentralization and leaving power in the hands of states.<sup>157</sup>

Most likely, the party structure reflected the increasing nationalization of preferences and served as an independent force in making state elections turn on national issues because of its role in providing information to voters. But for the purposes of this Article, whether the nationalization of the parties is a result of the nationalization of preferences or a cause is not particularly important. What is important is that whatever happened, the change seems to have made state issues relatively less important in state legislative elections.

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155. See Elmendorf & Schleicher, *supra* note 19, at 398–400.

156. Schleicher, *City Council Elections*, *supra* note 19, at 449.

157. See CHIBBER & KOLLMAN, *supra* note 94, at 156.

This theory—that there should be a causal relationship between the form taken by political parties and the role of national politics in state elections—can help answer the key question about the history of the Seventeenth Amendment, namely why it was popular among the state legislatures it disempowered. The nationalization of the meanings of party labels meant that state legislative elections were influenced to a greater degree by trends in preference for national parties. As state legislative elections turned more on the performance of national officials, state legislators, state parties, and state-based interest groups lost control over their own fate.

State legislators might have reasonably felt that they wanted more agency over their own fates and thought that having separate elections for senator and state legislator would allow voters to segment national politics from their minds when voting in state elections. Perhaps more importantly, state-based interests—from state parties to rural groups to local businesses—may have wanted to be able to influence election results at the state level without worrying that their efforts would be foiled by changes in far-off Washington (or beyond, if elections turned on foreign affairs). Groups that would otherwise have been assured of victory, due to popular support or financial muscle, could face unexpected losses if the election turned on national events. Those powerful in each state thus had an incentive to fight against linkages between state and national politics. And state legislators, responsive to those powerful at the state level, were likely responsive to this desire among state interest groups to divorce state and national politics as a constitutional manner.

Additionally, the change in party structure weakened the affirmative case for state legislative appointment. Recall that in the founding period, one of the justifications for giving state legislatures the power to appoint senators was to give the political culture of each state direct representation in Congress.<sup>158</sup> This type of collective representation was seen as a complement to the “individual” representation provided in the House of Representatives. But once voting at the Senate level became mostly based on the national coalition to which the senator belonged, or even the branch of the party to which the senator belonged, senators acted less as representatives of the state or its political culture and more like ordinary legislators, organized into coalitions based on national and regional issues.

This explains why there was little discussion of how the Seventeenth Amendment would harm the functioning of American federalism. The reason few made this argument may have been that few believed that senators still represented state governments or their unique political

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158. See *supra* notes 28–44 and accompanying text.

cultures.<sup>159</sup> As the parties nationalized and centralized, the logic of having state legislatures appoint senators withered.

Finally, the worry that Senate elections were excessively influencing state legislative elections helps explain why contemporaneous efforts to pass a constitutional amendment to reform the Electoral College failed while the Seventeenth Amendment was successful.<sup>160</sup> Although state legislatures have the power to determine how electors are selected under the original Constitution,<sup>161</sup> nothing requires them to select electors themselves. Thus, states are able to pass laws that bind electors to the results of general elections.<sup>162</sup> Compare this with the Oregon system, which had no formal power to bind state legislatures because the Constitution specifically placed the power to appoint senators in the hands of legislatures. Thus, although they are similar in many respects, nothing short of a constitutional amendment could remove senatorial politics from state legislative politics, whereas laws setting up a system of effectively direct elections for electoral college votes did not require a constitutional amendment.

This is just a theoretical treatment of why there might have been a causal relationship between the rise of national parties and the decline in opposition to direct elections in state legislatures. Doing much more than

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159. This also explains why there is so little in the record about how the Seventeenth Amendment would help or hurt the Democrats or Republicans. While it is amazing to imagine this from a modern perspective, people at the time probably imagined that the effect on the parties would be negligible, as state legislative elections were already tracking support for U.S. senators.

160. There is a limit to the degree to which the nationalization of party labels can capture the full range of reasons for the passage of the Seventeenth Amendment. The argument here is that the reason voters wanted a constitutional amendment (as opposed to simply adopting the Oregon system) was that they wanted to limit state legislative discretion in their own state to reduce the influence of national politics on state elections. But surely, part of the reason to use the constitutional amendment process was also to influence how other states chose their senators. And this story does not explain that.

161. *McPherson v. Blacker*, 146 U.S. 1 (1892) (upholding a state legislative plan to establish districted popular votes for the Electoral College). Notably, in states where the state legislature chose the electors directly, state legislative elections quickly became second order, with interest in the vote for President dominating any state-specific concerns. For instance, the most crucial state in the presidential election of 1800, between John Adams and Thomas Jefferson, was New York, where the state legislature chose the electors. EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* 87–106 (2007). When New York City voted for state legislature (which would determine control over the state legislature), both the Federalists and Republicans campaigned heavily. *Id.* This state legislative election was treated as a national referendum: “The local press focused squarely on national issues, not state ones. The looming showdown between Jefferson and Adams subverted the local race to national ends and relegated the Assembly candidates to the role of willing surrogates for the presidential aspirants.” *Id.* at 93. Interestingly, Alexander Hamilton, who led the Federalist campaign in New York, was engaged in a secret game to push the incumbent Adams aside as the Federalist candidate for President by promoting “individuals loyal to him for the New York legislature rather than secur[ing] the strongest Federalist candidates, some of whom might favor Adams.” *Id.* at 95–96. Thus, not only did national politics dominate state elections for voters that knew the state legislature would choose the President, but national politics even dominated the method of choosing candidates.

162. See generally *Ray v. Blair*, 343 U.S. 214 (1952) (holding that faithless elector laws are constitutional).



this is difficult, as the argument is attempting to provide an explanation for an absence—namely, why did we not see opposition to the Seventeenth Amendment among state legislatures. But evidence from debates over the Seventeenth Amendment suggests that such a relationship existed.

### C. DEBATES OVER THE SEVENTEENTH AMENDMENT

[N]ational interests, the party interests, are so overwhelming<sup>163</sup>

—Sen. John Palmer

The long public debate over the Seventeenth Amendment, both in Congress and in the popular press, focused on two contentions made by supporters of direct election: that (1) state legislatures were corrupt and easily bought by powerful business interests, and (2) state legislative appointment was elitist and anti-democratic.<sup>164</sup> There was also debate about the effect of choosing senators on the state legislative calendar, with many officials arguing that deadlocks and debate over senatorial appointments left state legislatures with little time to do the business of state government.<sup>165</sup>

Scholars investigating these arguments, however, have dismissed deadlocks and state legislative delay as causes for the passage of Seventeenth Amendment.<sup>166</sup> William Riker, perhaps the leading scholar on the subject, notes that Progressives at the turn of the last century considered direct elections to be a move in favor of federalism, but dismisses this argument as faintly ridiculous:

It was . . . frequently asserted that the direct election of senators would peripheralize federalism, strengthening state legislatures by forcing them to concentrate on state business. It is difficult to understand how even the progressive propagandists imagined that depriving legislatures of their only control over national affairs would strengthen houses that were already decadent for want of a significant agenda.<sup>167</sup>

Riker fails to notice that the effect of senatorial appointment was not only on state legislative time, but also on state legislative elections. Although much debate over the Seventeenth Amendment focused on the value of elite representation and claims that it would enhance democracy, there was, in fact, substantial discussion of the effect of senatorial appointment on state legislative elections. Supporters thought that holding direct elections for senators would strengthen state democracy, not only because doing so would reduce the time state legislatures devoted to senatorial appointment, but also because it would

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163. 28 CONG. REC. 6160–61 (1896) (statement of Sen. John Palmer).

164. See HAYNES, *supra* note 28, at 153–77, 195–96.

165. *Id.* at 191–95.

166. See, e.g., Riker, *supra* note 46, at 468; Zywicki, *Beyond the Shell*, *supra* note 2, at 195–200.

167. See Riker, *supra* note 46, at 468.

allow voters in state legislative elections to focus on state issues rather than national ones.

The evidence for this comes from popular histories of the Seventeenth Amendment and debates on the floor of Congress. While there little information about the debates in state legislatures, this evidence—much of which references such debates—is at least strongly suggestive that, at the time, state legislatures were concerned with the degree to which state elections turned on state issues during an era of national political parties.

### *I. Debates in Congress*

There is substantial evidence that the effect of senatorial appointment on state legislative elections was a key concern in the debate in Congress over the Seventeenth Amendment. Supporters of the Seventeenth Amendment argued over many years that national party politics and national issues intruded on state legislative elections because state legislators had the power to appoint senators. Direct election of senators was necessary to make state democracy function. Further, national party centralization had already ensured that senators were national political figures and not representatives of states, such that the case for legislative appointment was unavailing.

Senator John Hipple Mitchell ran the Oregon Republican Party machine for many years, and as a result, his opinions were likely representative of Republican opinion in the state legislature.<sup>168</sup> Mitchell was also one of the leading advocates of direct election, leading the floor fight in the Senate.<sup>169</sup> Both on the floor of the Senate and in accompanying editorial writing, Mitchell made clear that the influence of national politics on state elections was a major reason for his support. Writing in the popular journal *The Forum*, Mitchell argued:

Another vital objection to the choosing of Senators by the legislatures . . . is found in the fact that in the selection of candidates for the legislature whose business it is to choose a Senator, every consideration is lost sight of except as to how the candidates, if elected, will vote on the question of senatorship. This becomes the vital issue in all such campaigns, while the question as to the candidate's qualifications or fitness for the business of general legislation, or as to the views he entertains upon the great subjects of material interest to the State—taxation, assessments, schools, internal improvements, revenue,

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168. See Richard Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1069–70 (2009). Senator Mitchell's name should ring a bell for those who study civil procedure, as he played a central role in *Pennoy v. Neff*, 95 U.S. 714 (1878). Mitchell was an, er, colorful character, as Wendy Purdue's wonderful history of *Pennoy v. Neff* makes clear. Wendy Collins Purdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoy Reconsidered*, 62 WASH. L. REV. 479, 482–95 (1987).

169. HAYNES, *supra* note 28, at 103.

corporations, appropriations, salaries and fees of officers, trusts, municipal affairs, civil and criminal code, apportionment and other like important subjects—is wholly ignored, and thus not unfrequently, the most vital interests of the State are made to suffer from the very fact that the question of the selection of a Senator is a distracting and disturbing element, not only in the legislature itself, but in the primary and other elections involving the selection of members of the legislature.<sup>170</sup>

Mitchell—one of the leaders in the floor debate in the Senate in favor of the Seventeenth Amendment—put as one of his central arguments in favor of direct elections that it would improve state democracy. He repeated this argument on the floor of the Senate.<sup>171</sup> Thus, prior to the establishment of the Oregon system of quasi-direct elections, the leader of the Oregon Republican Party grounded his argument for direct election in part on the costs appointment of senators had on the accountability of the state legislature.

Mitchell was not the only senator to raise this argument. Senator John McCauley Palmer of Illinois argued that having state legislatures appoint senators was less democratic than having the Electoral College choose the President because the Electoral College had no other task, while state legislatures had to govern states.<sup>172</sup> Giving state legislatures the power to appoint senators meant that the only thing that mattered in state legislative elections was voter preferences about national parties:

It is simply a question whether the legislature, which is charged with the duty of conserving the interests of the State, shall be also required to separate themselves from those great duties and continue the exercise of the power of choosing Senators. That the duties interfere with each other nobody can doubt, because if there were no political influences—I mean if the legislatures of the States were disconnected entirely from the election of Senators—they would be the representatives of the real and present interests of the people of the States. Now, whatever may be the wants or the necessities of the people of the States with respect to local legislation, the legislators are elected with reference to the vote they will cast for Senator, and thus these duties are made to conflict, and *the national interests, the party interests*, are so overwhelming in comparison with those of the people of the States, of the local interests, that a Democratic legislature, or a Republican legislature, or a Populist legislature, instead of consulting the interests for which they are elected assume at once the sphere and field of political action, and if they elect a Senator who is satisfactory to the party in power all their shortcomings in regard to the interests of the people of their States are forgiven, unless indeed they should be guilty of some crime which would subject them to indictment. It is a

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170. Sen. John H. Mitchell, *Election of Senators by a Popular Vote*, in THE FORUM 25, 394 (June 6, 1896), available at <http://www.unz.org/Pub/Forum-1896jun-00385>.

171. 28 CONG. REC. 6152 (1896) (statement of Sen. John H. Mitchell).

172. 28 CONG. REC. 6160–61 (1896) (statement of Sen. John Palmer).

mixture of authority and a confusion of duties from which the legislatures of the States ought to be relieved.<sup>173</sup>

Palmer was clear that voter preferences about national parties dominated state legislative elections, which was why he supported direct election. Thus, another leading voice in the Senate on the subject thought that the combination of national parties and senatorial appointment led voters to ignore state issues when voting for state legislators.

In debates in the House, Representative Henry Tucker III of Virginia—later dean of the law schools at Washington and Lee and George Washington Universities and President of the American Bar Association<sup>174</sup>—made similar claims. In 1892, he argued that “the power given to the Legislature of the State to legislate on local matters for the interests of the people should not be interfered with or diverted by electoral functions in Federal matters forced upon it under the Constitution.”<sup>175</sup> He then went on to explain exactly why senatorial appointment interfered with state democracy:

[A] state may be greatly interested in a matter of local opinion. The political parties of the State may be divided on the subject, and yet the people of the State . . . may be in favor of such a law. But as there is a United States Senator to be elected in the Legislature, which is to be chosen at the same time that the local option bill is sought to be passed, the men that are in favor of the bill split their votes between the Democratic, the Republican and possibly the third party people. Why? In order to elect a United States Senator, when the matter they regard as of vital importance at their door is suffered to go down because of the injection of the Federal matter into the election of local State officers. . . . I would divorce as far as possible the Federal power from the State, and I would take away the power which is given under the present system which may defeat the local demands of the people because of the electoral functions in federal matters conferred upon the State legislatures by this provision of the Constitution for the betterment of neither and to the injury of both.<sup>176</sup>

Notice that Tucker’s argument relies heavily on the idea that party organizations—the Democratic, Republican, or “third party people”—do not divide on state issues but rather on national ones. Representative John Small, a Democrat from North Carolina, made a similar claim, arguing that changes in the party system were central to understanding senatorial appointment:

Another question which now plays a very prominent part in the choice of United States Senators was not thought of when the Constitution was adopted. The present party system of the United States was not

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173. *Id.* (emphasis added).

174. *Biographical Directory of the United States Congress*, Henry St. George Tucker, U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000399> (last visited Apr. 24, 2014).

175. 23 CONG. REC. 6065 (1892) (statement of Rep. Henry Tucker).

176. *Id.*

known, and no prophet had arisen who could fortell what the future party organization would be. All who favored the election of Senators by the legislatures did so in order to remove those elections from all partisanship and to keep them absolutely free from the influence of the Federal Government. When the matter was debated in the early days of our country's history the objection was always made that to have the election of Senators placed in the hands of the people would be to invite corruption and Federal influence.<sup>177</sup>

Small then claimed that senators were chosen because of the influence of the federal government—and particularly the President—and that they were more responsive to federal party influence than state interests. This was contrary, he claimed, to the intended separation of powers in the Constitution:

Another fact of common notoriety which can be proved is that the election of Senators is not now ever free from Federal influences when the legislature of the State which elects the Senator is controlled by the same party which controls the Federal Administration.

....

The question of what they are elected for goes to the very fundamental principle of the existence of the Senate. If they are elected by Federal influences, they can not serve the State as the Constitution intended they should. Experience has shown that the present method brings about elections by means of Federal influences. . . .

... [T]he United States Senate is not controlled by the States; but when the party whip is cracked with orders from the Executive Mansion, the Senators obey the whip and fall into line.<sup>178</sup>

Small was clear that changes in the party system had weakened the Founders' desire for the Senate to provide an alternative form of democratic representation from the House and the Presidency.

These are only characteristic of the debates of the period. These comments suggest that members of Congress thought that changes in the party system were linked both to (1) increasing the cost of senatorial appointment by making state legislative elections turn on national issues, and (2) reducing the benefits of senatorial appointment because appointed senators had become more responsive to national alliances than state-specific concerns. The next Subpart addresses how scholars at the time thought that the effect of direct elections on state legislatures was central to the case for the Seventeenth Amendment.

## 2. *Scholarship, the Press, and the Case for Direct Election*

In 1906, Political scientist George Henry Haynes published a detailed history of senatorial appointment, including a summary of all

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177. 33 CONG. REC. APPX. 315 (1900) (statement of Rep. John Small).

178. *Id.* at 316–17.

arguments for and against direct election.<sup>179</sup> Senator Robert Byrd noted that it is “an invaluable resource that has yet to be equalled.”<sup>180</sup> This is the most comprehensive existing work on the movement in favor of direct election, and provides the most compelling evidence of the importance of preserving state democracy as an explanation for support for the Seventeenth Amendment.

Haynes lists a large number of arguments in favor of direct election and lines up the usual suspects, ranging from the effect of direct election on increasing democracy to improving the quality of the Senate by limiting the chances of senators being elected only because of their proficiency in “the arts of the ward politician.”<sup>181</sup> He discusses corruption, the likely effect on the wealthy becoming senators, and many other issues.

But Haynes also devotes a whole chapter to how the “popular election of Senators would be of advantage to the state and local governments.”<sup>182</sup> Haynes summarizes several arguments, but the first and central one is that, although state governments have a great deal of power, “the spell which the national party casts upon the average voter is so strong that he rarely recognizes that, under all ordinary circumstances, it is the near-at-hand state government that his life, his liberty and his pursuit of happiness are far more essentially affected.”<sup>183</sup> Haynes argues that the reason for this is clear: “[S]tate politics has been entirely submerged by national politics is due, probably, more than to anything else, to the linking together of the two in the election of Senators.”<sup>184</sup>

Haynes acknowledges that even if direct election were enacted, candidates for the legislature would likely still run under national party banners, but they would “go before the people to be judged upon their merits as State legislators, not as counters in the game of federal lawmaking or office-winning.”<sup>185</sup> Under the appointment system, voters face “a most embarrassing dilemma” of having to decide whether to use their beliefs about state politics or national party politics when voting.<sup>186</sup> Haynes goes on to detail how voter desire to influence national politics allowed political machines to staff state legislatures with party hacks, as they knew voters would vote based on the Senate election rather than on the candidates running for state legislature.<sup>187</sup> Further, senatorial

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179. See generally HAYNES, *supra* note 28.

180. I ROBERT BYRD, *THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 405 (1988).

181. HAYNES, *supra* note 28, at 153–210, 171. This argument was a little odd, as if direct elections would reduce the power of candidates who were good politicians.

182. *Id.* at 180.

183. *Id.* at 180–81.

184. *Id.* at 181.

185. *Id.* at 184.

186. *Id.* at 185.

187. *Id.* 185–86.

appointment stood in the way of states agreeing to redistrict their legislatures to allow for more representative politics in state legislatures.<sup>188</sup> Senatorial appointment also encouraged national politicians to influence state politics. Haynes notes that the telegrams from national party leaders to state officials responsible for appointing senators took “on a dictatorial tone.”<sup>189</sup>

Herman Ames, who surveyed arguments in favor of direct election as part of an award-winning history of constitutional amendments written in 1897, also expressed concern about the corrupting influence of senatorial appointments by state legislatures.<sup>190</sup> He notes that proponents thought that direct election was more democratic, less likely to lead to corruption or excessive corporate influence, would result in more deserving candidates, and would end deadlocks.<sup>191</sup> He also notes that “the advocates of popular elections claim that the evils of the present method, which tend to the introduction of national affairs into State politics and lead to the election of members of the State legislatures on national instead of local issues, would be diminished.”<sup>192</sup>

These reviews of the literature cite numerous examples of this theme showing up in the scholarship and popular press of the time, and it takes no great feat to find many others.<sup>193</sup> While it was only one argument among many, it is clear that the influence national elections had on state elections was one of the planks of the argument for direct election. The argument was aided by the clarity of the national party positions.

The relationship between national party platforms and the need for direct election is perhaps made clearest in a remarkable editorial in the *Chicago Tribune* in 1894. This editorial actually rebuked candidates for state senator for running on state issues:

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188. *Id.* at 182–84.

189. *Id.* at 199.

190. IV HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 63 (1897).

191. *Id.* at 62–63.

192. *Id.*

193. See, e.g., Charles James Fox, *Popular Election of U.S. Senators*, 27 *ARENA* 455, 461 (1902) (“[T]he question as to how a person will vote for senators has become an important but illegitimate factor in his qualification for the state legislature.”); EDWIN MAXEY, *SOME QUESTIONS OF LARGER POLITICS* 72 (1905) (arguing that “members of the legislature are chosen, too frequently not with a view to their fitness to serve their State in the capacity of legislators, but because they favor this or the other candidate for United States Senate”); HAYNES, *supra* note 28, at 184 n.4 (“This election of senators by the state legislatures has insured the subordination of state to federal politics; maintained party divisions that were natural in the national field in a field (municipal as well as state) where they were uncalled for and mischievous; made the ‘final end’ of a legislature not the proper affairs of the State, but the election of state senators in the interest of national party supremacy; constrained the conscience of men to vote for unworthy candidates for the legislature lest the party at Washington should be imperiled, and in a word, prepared the way for the absolute domination of the machine as we see it today.” (citation omitted)).

Do these Democratic State Senators think the voters can be called off from the national issues involved in the direct election of Representatives and the indirect election of a Senator to consider only local questions. That they will drop the Wilson bill and devote their attention to the establishment of a Police Board in Chicago? That they will lose their interest in the currency—in the silver question and the taxation of State bank notes—and become wrapped up in the question whether the Chicago park boards shall be elective or appointed. . . . The people are not such fools. They are not such children that they can be induced to consider the abolition of the Town Assessor system at a time when they are doubtful whether the Democratic tariff policy will leave them anything which is worth assessing.<sup>194</sup>

Put together, these sources indicate that people during the debates over direct election were quite worried about the influence that national issues had on state legislative elections. The documents also show that leaders linked this to the fact that the parties were national in scope and ideological in form. The political science literature shows that this was newly the case around the time the movement for direct election took off, and that the parties became more national and more ideological as pressure mounted to change the Constitution to allow for direct election. While this is not proof that the changes in party form had a clear causal effect on support for the Seventeenth Amendment, it is highly suggestive of this.

The next Part analyzes what this relationship reveals about modern arguments over the Seventeenth Amendment and federalism more generally.

### III. THE SEVENTEENTH AMENDMENT AND FEDERALISM THEORY

This Part will discuss the implications of the fight over the Seventeenth Amendment for how we think about federalism, both in scholarship and judicial opinions. The history of the Seventeenth Amendment has substantial and important lessons for how contemporary federalism works in practice.

#### A. THE SEVENTEENTH AMENDMENT AND THE PROBLEMS OF POLITICAL SAFEGUARDS OF FEDERALISM

Legal scholars have long debated whether and how courts should police the lines of authority provided in the Constitution.<sup>195</sup> Herbert Weschler, in one of the more famous essays in American legal scholarship, lays out a strong argument that courts should largely stay out of disputes

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194. *The Want to Dodge National Issues*, CHI. TRIB., May 14, 1894.

195. See *New York v. United States*, 505 U.S. 144, 149 (1992) (describing the “proper division of authority between the Federal Government and the States” as “perhaps our oldest question of constitutional law”).



between the federal government and the states.<sup>196</sup> Weschler argues that, instead of relying on courts, the Framers created “political safeguards of federalism” or structural and cultural limits on federal encroachment on state powers.<sup>197</sup> Structures like the Electoral College, the fact that representatives in the House are allocated by state and not purely by population, and the very existence of the U.S. Senate, with its equal representation for each state, serve to protect the interests of the states.<sup>198</sup> This obviates the need for courts to police federal authority. The Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* relied on Wechsler and others as reason to avoid a heavy-handed review of Congressional authority.<sup>199</sup>

Larry Kramer, in two well-known pieces, rejects Wechsler’s characterization of the efficacy of the structural protections for states, but argued that there were other political safeguards for federalism.<sup>200</sup> Federalism, Kramer argues, is the constitutional protection of the “regulatory authority of state and local institutions to legislate policy choices.”<sup>201</sup> The Constitution’s structural provisions may protect interests that reside in states, but they do not protect the authority of state governments to legislate against federal encroachment. For instance, the Electoral College may give ethanol producers in Iowa more influence than they would have in a system of purely popular elections for President, but this does little to protect the regulatory authority of the state government of Iowa.

Kramer claims, however, that there were in fact strong political safeguards for states because politics was organized at the state level.<sup>202</sup> The Framers understood that the real protections for states were not in “Wechsler’s tidy, bloodless constitutional structures,” but were rather provided by “real politics, popular politics: the messy, ticklish stuff that was (and is) the essence of republicanism.”<sup>203</sup> State leaders would drum up opposition to federal encroachment on their authority and could count on popular support due to the greater connection with the people

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196. Wechsler, *supra* note 21, at 558–59.

197. *See generally id.*

198. He notably does not discuss the Seventeenth Amendment at length. *See* Kramer, *Understanding Federalism*, *supra* note 21, at 1503 (noting the oddity of Weschler’s decision not to discuss the Seventeenth Amendment extensively).

199. 469 U.S. 528, 550–51, 551 n.11 (1985) (citing JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–84 (1980)).

200. Kramer, *Putting the Politics Back*, *supra* note 21, at 221–27; Kramer, *Understanding Federalism*, *supra* note 21, at 1503–15. Kramer also critiques Weschler’s reliance on “cultural foundations,” as these were more likely the result of other protections for states, rather than being an independent source of protection for states. *Id.*

201. Kramer, *Putting the Politics Back*, *supra* note 21, at 222.

202. *Id.* at 257.

203. *Id.*

and greater regulatory ambit.<sup>204</sup> The political safeguards of federalism lay in the political power of state leaders to rally popular support.

The modern version of this is state-based political parties. Compared with European political parties, American parties have been less “programmatically”—ideologically coherent and committed to achieving an ideological agenda—and less “centralized”—run by a top-down national organization.<sup>205</sup> Instead, Kramer argues that America’s parties were largely run by state and local politicians and activists.<sup>206</sup> The power of state politicians over political parties gave them control over federal elections, which in turn protected states as institutions, as federal government overreaching could be punished through use of the party apparatus in elections.

In the 1990s, when Kramer wrote his two classic pieces, the weakening of the party system that occurred in the 1970s was already giving way to our currently heavily polarized party system.<sup>207</sup> Kramer notes that, while the parties may be growing more centralized and programmatic, state parties have retained substantial influence.<sup>208</sup> Further, a new form of protection has emerged: the states’ role in the administration of federal programs.<sup>209</sup> Because the federal government relied on state governments to administer its policies, states had all sorts of protections against excessive federal intrusions.

While the power of states as part of the administrative process has been substantially fleshed out in recent times and shown to have real teeth, the story of state parties as political safeguards has not fared as well because the trend that began before Kramer’s articles has become even more significant.<sup>210</sup> Today’s political parties have become substantially more programmatic and centralized. Congress is more polarized than ever, with the party affiliation defining almost all

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204. *Id.* at 258–66.

205. *Id.* at 278–87; Kramer, *Understanding Federalism*, *supra* note 21, at 1520–42.

206. Kramer, *Putting the Politics Back*, *supra* note 21, at 280.

207. *Id.* at 280–83. *See generally* ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION & AMERICAN DEMOCRACY* (2010) (cataloging and attempting to explain the increasing polarization of political parties and elites over the last thirty years); NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006) (highlighting the history of polarization in Congress).

208. Kramer, *Putting the Politics Back*, *supra* note 21, at 278–89.

209. *Id.* at 283–87.

210. For a small taste of the work on the relationship between states and federal administrative agencies, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1275–80 (2009) (discussing how uncooperative behavior by states implementing federal laws resulted in policy changes); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (discussing the influence of state regulators in federal administrative regimes); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 90 (2009) (citations omitted) (noting that state participation in federal regulatory regimes “provides a prime example of the operation of cooperative federalism”).

variation in congressional voting and with substantial distance between the mean policy preferences of each parties' legislators.<sup>211</sup> Organizational control over party strategy has flowed to national organizations like the congressional campaign committees and Presidential campaigns. Since the 1970s, each party's candidates have become more similar to one another ideologically, no matter what type of district they run in.<sup>212</sup> Presidential candidates are similarly growing more ideologically distinct.<sup>213</sup> There is little evidence that state parties exert any meaningful control over members of Congress; members are responsive to national and not local trends and control.

Kramer acknowledges that "parties change constantly," but also claims that their decentralization and non-programmatic nature have been relatively constant.<sup>214</sup> From this, he argues that state parties have, at least until the most contemporary period, consistently provided political safeguards for federalism.<sup>215</sup>

The story of the Seventeenth Amendment shows that political parties were changing a great deal even prior to the last few decades. The increased ideological definition and organizational centralization of the two major parties in the period after 1896 made national politics a more significant part of state elections, reducing the degree to which state politicians mattered to election results. The move toward programmatic and centralized parties in the early part of the twentieth century was not as dramatic as we would see in the early part of the twenty-first century, but it represented a decrease in the strength of the non-formal political safeguards of federalism. As the non-formal safeguards weakened, support for a formal political safeguard of federalism, the power of state legislatures to appoint senators, also withered.

Kramer's arguments about the political safeguards of federalism have been criticized by modern judicial federalists for failing to acknowledge that informal safeguards are contingent on the existence of a particular political order, rather than absolute like the Constitution's

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211. ABRAMOWITZ, *supra* note 207, at 140–44 (describing changes in polarization in Congress); MCCARTY ET AL., *supra* note 207, at 3; Jacob Jensen et al., *Political Polarization and the Dynamics of Political Language: Evidence from 130 Years of Partisan Speech*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2012, at 1, 5–6 (analyzing language used in congressional debates to find that polarization increased for thirty years although at lower rates than during New Deal period and earlier).

212. Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136, 136 (2001).

213. See David Andersen et al., *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395, 396–98 (2008) (noting that Presidential candidates have become more ideologically distinct, leading to voters become better at voting "correctly" or in line with their ideological preferences).

214. Kramer, *Understanding Federalism*, *supra* note 21, at 1523.

215. *Id.* at 1524.

guarantees.<sup>216</sup> The history of the Seventeenth Amendment provides an example of how shifts in the political order can affect state governmental power in the federal legislature. Thus, while the history of the Seventeenth Amendment provides an important caveat to Kramer's arguments about judicial enforcement of federalism, it also provides substantial support for his analytical claim that we should look to how political parties function to understand how federalism works.

Perhaps the most important lesson from the Seventeenth Amendment is less about safeguards and more about the very basic question of what those safeguards protect. Kramer writes: "federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices."<sup>217</sup> The next Subpart shows that this elides an important distinction between state regulatory authority and popular authority at the state level.

#### B. THE SEVENTEENTH AMENDMENT AND THE PROBLEM OF CONFLATING FEDERALISM WITH STATE AUTHORITY

Scholars and politicians have rather endlessly debated whether national or state-based solutions to specific policy questions are superior. There has been a similarly endless debate about whether the Constitution—either as interpreted by courts or implemented by political institutions—should do more to protect state policymaking from federal encroachment, that is, should we have more federalism or more nationalism. Most of these discussions, as Kramer's previous quote suggests, have either clearly stated or tacitly assumed that increasing and protecting state regulatory authority—including the power of state entities to make policy decisions—is what federalism protects from encroachment by the federal government.<sup>218</sup> The idea that federalism

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216. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 115–16 (2001).

217. Kramer, *Putting the Politics Back*, *supra* note 21, at 222.

218. Perhaps the clearest expositor of this view is Ernie Young. In his terrific article, *The Rehnquist Court's Two Federalisms*, Young argues that functional arguments in favor of federalism should be understood to protect state autonomy and not state sovereignty, or rather than sovereignty, or separation and protection from national authority. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 50–52 (2004) ("[I]t makes sense to look to the underlying values that federalism is generally thought to serve. . . . They tend to fall into two loose groups. The first is concerned with regulatory outcomes: Federalism permits a diversity of regulatory regimes from state to state, which may allow satisfaction of more people's preferences, regulatory experimentation, and competition among states to provide the most attractive regime. The second group has to do with the political process itself: State governments provide a check on national overreaching, foster political competition and participation, and may even help build social capital. Autonomy, not sovereignty, provides the common theme of all these arguments. Just having state governments is not enough; those governments need to have meaningful things to do. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora. The

equals state authority or autonomy, whether it is enforced by courts or protected by the institutional design of the federal government, is almost universal.<sup>219</sup>

Something subtly different emerges, however, when one considers the equally endless and unbelievably varied normative justifications for federalism. Most normative justifications for federalism rely on an assumption that state majorities will be able to use elections to promote their policy preferences. That is, the benefits that run from having a federal system are dependent, in part, on the functioning of state democracy.<sup>220</sup>

It may seem safe to assume that the power of state officials to enact policies and the power of majorities inside the state to choose policies are the same. After all, state government officials are elected by majority vote. However, the history of the Seventeenth Amendment shows us is that, under certain conditions, there are powers states can hold that *reduce* the capacity of state voters—real and not hypothesized voters, full of warts and empty of some important relevant political knowledge—to affect policy decisions at the state level. Thus, increasing state power in some instances can actually reduce the benefits of federalism.

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sovereignty model of the Rehnquist Court's working majority on federalism issues, by contrast, has emphasized the separate and independent existence of the states, as if mere existence were the primary value to be preserved. The Court's focus on the states' sovereign immunity from private lawsuits, for example, has expended much time and political capital on an issue that has little to do with what functions remain for state governments to perform." (citations omitted) (internal quotation marks omitted)). Young fails to note that there is a distinction between state autonomy and making state policy responsive to state majorities. And that the latter principle is responsible for the normative arguments in favor of federalism, in ways that increased autonomy can sometimes inhibit.

219. There are some exceptions. Most notable is the work of John McGinnis and Ilya Somin. See John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. REV. 89, 89–92 (2004). Taking off from the well-known section from *New York v. United States*, 505 U.S. 144, 181–182 (1992), which argued that federalism sometimes had to be protected from state officials who would rather cede responsibility to the federal government, McGinnis and Somin lay out a full-throated argument that state autonomy and federalism are substantially different. *Id.* at 90. While Somin and McGinnis do not focus on the formal bounds of connection between state governments and the federal government, like state legislative appointment of senators.

220. One potential objection must be noted. Malcolm Feely and Edward Rubin distinguish federalism as a theory from local democracy largely on the grounds that "federalism reserves particular issues to subnational governmental units, regardless of the political process that exists within these units." MALCOLM M. FEELY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 31 (2008). I do not disagree with this statement, at least in theory, as it is not difficult to imagine federal systems with major non-democratic elements (for instance, with provinces run by unelected tribal chieftains). But for Rubin and Feely, federalism exists to protect distinct political identities. In systems where state-based political identities are expressed democratically (as in the American system, where states must provide republican government), the case for federalism *does* rely on the quality of local democracy, and the benefits of federalism are eroded by giving states powers that limit the ability of locals to choose local policies.

This is broadly true across most normative theories of federalism.<sup>221</sup> For instance, the benefits of federalism that flow from the smaller size of states as polities, and the theoretical improved responsiveness of policy to majority preference that results from this smaller size, will not appear if state-based voters make their decisions based on national issues. Giving states control over national political results can make state elections more second order, and hence less responsive to state opinion on state issues. Sorting, or Tieboutian, theories of the benefits of federalism rely on states providing many different choices for mobile citizens.<sup>222</sup> If the Constitution forces national decisions on state legislatures, this could result in a reduction in the differences between state policies, as they take, for instance, either Democratic or Republican form and do not provide a wide range of choices. The legislatures running “laboratories of democracy” will experiment less if they get little electoral credit for successful innovations. If state legislative elections turn largely on a race for a senator, there is little reason for state legislators to bother with innovative, costly to devise, and risky new ideas.<sup>223</sup> Theorists who argue that federalism can help solve the conflicts that arise from the existence of geographically specific cultural differences in big countries, like Ed Rubin and Malcolm Feely, need state politics to express local identity, which can be frustrated if the constitutional organization leads to state voters making national decisions when choosing state legislatures.<sup>224</sup> The benefits of inter-jurisdictional synergy through “cooperative” or “uncooperative” federalism rely on the existence of inter-jurisdictional differences and competencies.<sup>225</sup> And so, normative justifications for federalism rely on the quality of state democracy.<sup>226</sup>

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221. For a nice summary and categorization of theories of federalism, see generally Erin Ryan, *The Once and Future Challenges of American Federalism: The Tug of War Within*, in *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* (Alberto López-Basaguren & Leire Escajedo San Epifanio eds., 2013).

222. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that diffusing power to many local governments will produce an optimal provision of local public services under some conditions).

223. The term laboratory of democracy derives from *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); Cf. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (arguing that limited electoral incentives for state officials results in suboptimal amount of state policy innovation).

224. FEELY & RUBIN, *supra* note 220, at 15–38.

225. SCHAPIRO, *supra* note 210, at 45 (providing an argument for benefits of federalism that flow from “cooperative” or “symphonic” inter-jurisdictional synergy). See generally Bulman-Pozen & Gerken, *supra* note 210 (providing an argument that federalism promotes benefits from “uncooperative federalism” or inter-jurisdictional conflict).

226. An exception might be drawn for checks and balances theories of federalism, or arguments that the reason to give states power is that it limits the ability of national majorities to push their

This has a number of implications. First and foremost, advocates of repealing the Seventeenth Amendment, from scholars like Zywicki and John Yoo to jurists like Justice Scalia to politicians like Rick Perry, do so because they think that repeal would enhance the values associated with federalism.<sup>227</sup> They are wrong. Although state elections *still* turn heavily on national issues, repealing the Seventeenth Amendment would make state elections turn on national issues to an even greater degree. This would reduce the quality of state democracy and thus reduce the quality of American federalism.<sup>228</sup>

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policies absent widespread agreement. Even if state elections are merely another sphere in which national politics expresses itself, the existence of many states each with some degree of autonomy means that it will be more difficult for a national majority to achieve its objectives. Even if this is the case, the effect of giving states powers that render their elections second order has a somewhat ambiguous effect on checks and balances. If a President is elected with coattails, then he and the national government will have greater power if state elections follow national ones. State officials elected because of the President (and who will be reelected only if the President is popular) will have incentives to push the President's agenda in areas where Congress cannot legislate due to constitutional constraints or a sheer lack of time and resources. However, where the President's party is rejected in off-term state elections, as is often the case, his power will diminish and there will be greater checks on federal power. Thus, giving states control over national entities like the Senate, which encourages state elections to be second order, will affect the strength of checks and balances in the system. Having state elections turn on state issues will mean a more steady check on the power of national officials. As we are particularly worried about the existence of checks following landslide elections (when other checks are not available), the effect of second-order elections on checks and balances is likely negative, even if there are times when second-order elections increase checks on the presidency.

227. See RICK PERRY, *FED UP! OUR FIGHT TO SAVE WASHINGTON* 42–44 (2011); Zywicki, *Beyond the Shell*, *supra* note 2, at 166; John Yoo, *Repeal the Seventeenth Amendment*, *THE CORNER: NAT'L REV. ONLINE* (Oct. 22, 2010, 12:10 PM), <http://www.nationalreview.com/corner/250726/repeal-17th-amendment-john-yoo>.

228. It should be noted that this requires a simplifying assumption that voter preferences are either separable (their voting preference at the state level is not conditional on who is in charge at the national level) or non-separable in a way that does not create a “doctrinal paradox.” See generally Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687 (2010). To the extent preferences are separable, state democracy would be made worse off by repealing the Seventeenth Amendment, as voters could not use state elections to hold state officials accountable without it affecting their preferences in federal elections. If state voters care more about federal policy or the party system is organized in ways to make choosing in federal elections easier, then state democracy will suffer. However, if preferences at the state and national level are non-separable, there are certain preference orders that would result in voters being either better served or no worse served by linkages between the two types of elections. It is not difficult to imagine such preferences. For instance, before a voter supports a high-tax party at the state level, she may want to ensure a low-tax party is in charge at the national level. If preferences take this form, choosing state and federal officials separately can lead to a negative outcome for some voters (in the example above, high or low tax parties in charge at both levels). This is an application of the “doctrinal paradox” identified by Lewis Kornhauser and Larry Sager. See Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 10–13 (1993); see generally Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986). But the assumption here is a modest one. First, non-separability of preferences only harms the normative conclusion that the Seventeenth Amendment was bad for state democracy if preferences in the electorate take a form where they are prone to cycling results and parties behave in a specific way, following the platforms they announce even if things change at another level of government. Given that much voter assessment is retrospective based on holding incumbent officials responsible for results rather than

Second, other institutional rules that link federal representation to state legislative elections also reduce the benefits of federalism. Franita Tolson argues that partisan gerrymandering is a “safeguard of federalism.”<sup>229</sup> She argues that states can use their power over congressional districting to protect their interests.<sup>230</sup> Like arguments made by supporters of repealing the Seventeenth Amendment, Tolson’s claim ignores the harm that linking levels of government can cause to state politics. Because states have the power to gerrymander, federal officials, organizations, and interest groups all become heavily involved in state elections prior to redistricting, flooding state elections with outside money, all in the name of affecting Congress.<sup>231</sup> Gerrymandering, like state legislative appointment of senators, turns state legislative elections into proxy fights for control of Congress, reducing the accountability of state officials for state policy. The power to gerrymander, thus, reduces the quality of state democracy and hence the benefits of federalism.

Even more commonly, the federal government shares responsibility in some policy areas with state governments. Rather than implementing its own policy, the federal government engages in “cooperative federalism,” and in doing so achieves certain benefits, including greater local tailoring of policies, mixing the differing competencies of state and federal governments, and gaining legitimacy and efficacy from the involvement of state actors.<sup>232</sup> Such mixing of responsibility also allows for “uncooperative federalism,” for which state officials use their involvement in policy areas to dissent, thus creating new nodes for political disagreement and better public debate.<sup>233</sup> But sharing responsibility across types of government has a cost in terms of its effect

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promises, state officials have strong incentives to produce positive results for voters, which requires taking into account what is happening at other levels of government. Further, state legislative elections in the pre-1913 world did not determine more than a little about the makeup of federal power; state legislatures each only chose two senators (and one at a time), and had no direct effect on the House or the President. Thus, even fully informed voters with non-separable preferences should have in most instances voted *as if* their preferences were separable as the practical effect of the linkage was small. Finally, it is unlikely that voters could develop enough information about candidates, parties, and policy interactions between the state and federal level to operationalize a set of non-separable preferences (even though the mere fact that voters behave naively and not strategically does not eliminate the possibility that they were in fact made worse off by breaking the link between the Senate and state legislature). As a result, the assumption that the doctrinal paradox does not seriously imperil this normative claim, but it is an assumption. Thanks to Michael Gilbert for forcing me to think about this.

229. See generally Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859.

230. *Id.* at 860.

231. As Michael Kang notes, “the most aggressive offensive gerrymanders during the recent cycle of congressional redistricting occurred after energetic intervention by federal-level party leaders.” Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443, 465 (2005).

232. See SCHAPIRO, *supra* note 210, at 45.

233. Bulman-Pozen & Gerken, *supra* note 210, at 1259.



on accountability. Research shows that voters have some ability, although not a great deal, to assign responsibility to different levels of government.<sup>234</sup> Where possible, voters can use elections at each level to hold officials accountable for the effect of policies they have enacted. Where policy responsibility is mixed, however, it is more difficult for voters to use elections at any level to hold officials accountable. As John McGinnis and Ilya Somin posit, this harms the efficacy of federalism across a number of dimensions.<sup>235</sup>

This discussion further problematizes Kramer's theory of the political safeguards of federalism.<sup>236</sup> Kramer argues that interaction between state parties and national politics protects the values of federalism by protecting state authority. Interaction between national and state parties, however, can result in weakening the ability of state voters to control state policy. Thus, the very safeguards Kramer finds for the formal authority of states can reduce the functional benefits of federalism.<sup>237</sup>

### C. CAN STATE DEMOCRACY WORK?

This story of the Seventeenth Amendment has an ironic ending. If a goal of the Amendment was to reduce the influence voter preferences

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234. See Elmendorf & Schleicher, *supra* note 19, at 404–05.

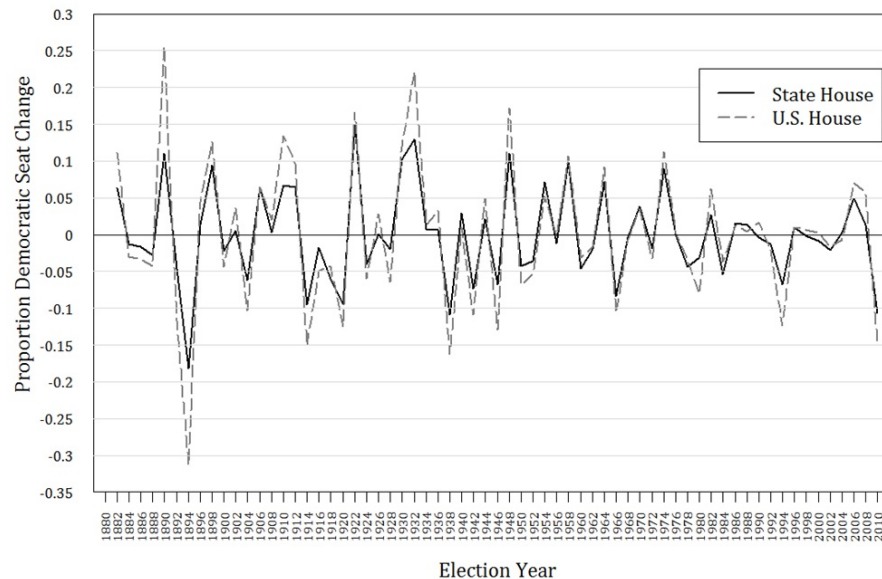
235. McGinnis & Somin, *supra* note 219, at 109–12.

236. James Gardner wrestles with some similar questions about Kramer's work in a recent draft. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties and the National Colonization of State Politics*, 29 J.L. & POL. 1, 58–59 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2191150](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191150). However, Gardner does not explain the mechanisms through which national politics influences state politics, except to note that parties are involved. *Id.*

237. It may, however, serve to improve the democratic process at the federal level. In a recent paper, Jessica Bulman-Pozen argues that second-order elections at the state level may be good for national politics, as the minority party at the national level will have, through its control of state governments, avenues through which it can provide actual examples of how alternatives to the majority party's approach will work, and opportunities to frustrate the majority party's agenda through "uncooperative federalism." Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1105–08 (2014). Voters using state elections to comment on national politics are thus, Bulman-Pozen argues, providing a democratic good—making federal politics work better by having a more efficacious check on majority party power. *Id.* at 1191 n.192. Bulman-Pozen's work is challenging and fascinating, but the costs of whatever improvement the existence of second-order elections at the state level provides to national level discourse are quite high. As argued above, second-order state elections reduce or eliminate accountability for state level officials, reduce the variation in state policy and thus harm the benefits from sorting and choice of law, and harm the degree to which state policies follow state voter preferences, at least to the extent that states are doing things other than merely rearguing national issues. Although states and the federal government do deal with some issues in common, the most important national issues—such as war and peace, monetary policy, and deficit spending—have no state policy analogues (states are generally barred from any of these issue areas by the Constitution, federal laws, or state constitutions). Thus, it is difficult to see this benefit to federal democratic discourse as more than a small offset to the costs to society of having second-order state elections.

about national politics had on state elections, it has largely failed. Consider this chart:

FIGURE 1: DEMOCRATIC SEAT CHANGE IN STATE HOUSE AND U.S. HOUSE ELECTIONS<sup>238</sup>



When Democrats or Republicans are popular and do well in national elections, they usually win elections at the state legislative level as well. Despite the passage of the Seventeenth Amendment, state legislative elections still largely turn on federal issues.

If the Seventeenth Amendment was intended in part to separate state politics from national politics, then why did it not succeed? Perhaps the reason is the existing bond between states and the national government, like the power to gerrymander, but I doubt this has more than a small effect. More likely, the information provided on the ballot linking national and state politics explains the failure of the Seventeenth Amendment to separate state and national politics. The Seventeenth Amendment focused on the structural constitutional connection between

238. This chart was prepared by Steven Rogers and it and the underlying data is available upon request.

state governments and the national government created by state legislative appointment of senators. But what makes state legislative elections substantially second order are the laws and politics that create a unified party system.

The source of second-order elections is frequently “mismatch” in the party system. Today more than ever, parties are defined by the national political commitments of their candidates and members.<sup>239</sup> Voters see the endorsement of these national coalitions on the ballot, and because voters know little about individual candidates, it is rational to use these heuristics about national politics in state and local elections if there is any correlation at all between national and local preferences. The result is what we see in the chart above—voters use their preferences about the President and Congress to determine their vote for state legislature or city council. At the local level, this is particularly dramatic; the correlations between national and local voting can be extremely high.<sup>240</sup> In state legislative elections, there is *some* evidence that *some* voters care *somewhat* about the actual performance of the state legislature; this influence is more pronounced if voters actually know which party is in the majority. But as Steven Rogers has shown, the largest influence by far on state legislative elections is the approval rate of the President.<sup>241</sup> The dominance of national parties in many states means there are a large number of uncompetitive state legislatures.

Accountability and representation in state government suffer as a result. One might think that when a state that, say, is largely Republican at the national level chooses a largely Republican state legislature, the quality of representation—the degree to which voter preferences are translated into policies—is relatively high. This would be a mistake. An absence of competition at a level of government means little accountability based on performance for the actions of incumbent officials. While high profile governors face retrospective evaluation on the performance of state economies, the low salience of state legislative races means that they face few consequences when the policies they enact go badly.<sup>242</sup> Further, primary elections are low-information affairs, as voters do not have access to high-value heuristics like party labels in primaries. There is thus

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239. Elmendorf & Schleicher, *supra* note 19, at 402. See generally Schleicher, *City Council Elections*, *supra* note 19; Schleicher, *What if Europe*, *supra* note 19; David Schleicher, *I Would but I Need the Eggs: Why Neither Exit nor Voice Limits Big City Corruption*, 42 *LOV. U. CHI. L.J.* 277, 288 (2010) [hereinafter Schleicher, *I Would but I Need the Eggs*].

240. Schleicher, *City Council Elections*, *supra* note 19, at 420, 458–59.

241. See Rogers, *supra* note 18, at 22–24.

242. See Elmendorf & Schleicher, *supra* note 19, at 398–400 (discussing differences between Gubernatorial and state legislative elections).

little reason to believe that these state legislatures are responsive to differences or changes in preferences among majority party supporters.<sup>243</sup>

Also, the issue areas in which state governments and the federal government make policy are at least somewhat distinct. Although there are many policy areas in which the policy responsibilities overlap in this era of cooperative federalism, issues that dominate national politics and drive voter party identification often have no local analogue. For instance, states are either barred by the Constitution, state constitutions, or preemption by federal law, or have largely been edged out by comprehensive federal policy in policy areas like counter-cyclical deficit spending, monetary policy, war-making, trade, treaty making, and healthcare and social security for retirees.<sup>244</sup> Further, the mobility of residents and capital puts some limits on the ability of states to engage in the type of redistributive taxing and spending that is possible at the national level, although the strength of these limits is more limited than many suggest.<sup>245</sup> In many of the most important areas of state governmental policymaking, the federal government is a junior partner, like private law subjects, land use, family law, criminal law, and, traditionally at least, education.<sup>246</sup> While voters' preferences on state policies are surely correlated with their preferences about national policies, there is no reason to think that they are the same.

As a result, there is little reason to expect that state elections that are responsive to national trends will produce particularly representative state policies. And in fact they do not. In the leading recent paper in the field, Jeffrey Lax and Justin Phillips find that opinion majorities among state residents on specific issues are no more likely to have their preferences chosen by state government than if policies were chosen at random.<sup>247</sup> Even opinions held by super majorities of the state population

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243. For an extensive discussion of the problem of voter ignorance inside party primaries, see generally *id.*

244. See generally Brian Galle & Jonathan Klick, *Recessions and the Social Safety Net: The Alternative Minimum Tax as a Countercyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187 (2010) (stating that states are generally barred by their constitutions from engaging in counter-cyclical deficit spending); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2010) (discussing how Social Security and Medicare are exclusive federal programs); see also Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 145 (2001) (discussing how treaties, trade, and monetary policy are exclusively granted to the federal government).

245. See generally Schleicher, *City Council Elections*, *supra* note 19 (reviewing literature on effect of mobility on local redistributive spending, and arguing that agglomeration economies allow even local governments to engage in substantial redistribution); Schleicher, *I Would but I Need the Eggs*, *supra* note 239.

246. *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); Stephen Breyer, *Judicial Review: A Practising Judge's Perspective*, 19 O.J.L.S. 153, 154 (1999) ("[T]he 50 states, not the federal government, are responsible for much of American law, including family law, property law, contract law, tort law, most criminal law, and most other commercial law.").

247. Lax & Phillips, *supra* note 22, at 149.

win in state legislatures barely more than sixty percent of the time.<sup>248</sup> State legislative elections just do not produce particularly accountable or representative government, and this is largely a result of the fact that state elections turn on national, rather than state-specific issues and performance.

These facts contradict a basic application of Anthony Downs's well-known median-voter theorem. Downsian models assume that a party that is not in power—say Massachusetts Republicans or Wyoming Democrats—will adopt policy positions on state issues that appeal to 50.01% of the voting public and therefore become competitive.<sup>249</sup> So why don't state parties that lose virtually all state legislative elections, like Massachusetts Republicans or Wyoming Democrats, do so and reap electoral rewards? Downsian models are inconsistent with what we perceive in the world, levels of government where there is an effectively permanent lack of partisan competition. In a series of papers, I have developed three explanations: laws that inhibit rebranding, voter difficulty in differentiating parties at different levels of government, and an imbalance of voters who form their party preference on non-ideological grounds.

First, laws limit the development of differentiated local and state parties. In order to operate like a party in a median voter model, the minority party must be able to adopt a clear platform on issues relevant to the office that appeal to the median voter. Election laws make this difficult. State laws often limit the ability of voters to belong to different parties at different levels of government or switch easily back and forth.<sup>250</sup> Laws frequently also require primary elections, and as a result, a local minority party will face difficulties fielding a consistent and competitive slate of candidates, as the party's primary electorate and candidate base is likely to be comprised entirely of voters on a distant fringe of the municipality's ideological spectrum. Further, where the issues that are decided by the state or local government are orthogonal to or only weakly correlated with the main dimension of national politics, there is no reason to believe that a primary electorate and candidate base determined by national preferences will be able to agree on local or state policies that would appeal to the jurisdiction's median voter.<sup>251</sup> The base of, say, the Republican Party of New York City is unlikely to be able to field a set of ideologically coherent and competitive candidates across offices, as it is

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248. *Id.*

249. See ANTHONY DOWNS, *supra* note 133, at 114–49 (1957).

250. See Schleicher, *City Council Elections*, *supra* note 19, at 448–60. Also parties earn automatic ballot access for down-ballot races—including races for city offices—through a strong showing in the gubernatorial race. *Id.* at 450, 450 n.108. This makes it difficult for third-party entrants, as they have to pass an established party in order to become one of the top two vote getters.

251. See Elmendorf & Schleicher, *supra* note 19, at 404–06.

likely too far to the right for the average New York resident on issues that correlate with national politics and too unorganized on issues that do not.<sup>252</sup> As a result, the party cannot build a locally competitive brand and voters use their national preferences in local non-mayoral elections.

At the local level, there is substantial evidence that the major parties do not behave like median-voter parties. Instead, a party is only weakly correlated with local issue preference.<sup>253</sup> At the state level, some parties have made efforts at rebranding themselves on state issues.<sup>254</sup> But even where state-issue rebranding occurs, it frequently does not seem to matter. For instance, based on survey data of legislators and voters, Massachusetts Republican legislators have issue stances that are very close to those of the median Massachusetts voter.<sup>255</sup> And yet they lose badly every election.<sup>256</sup>

The second and third examples may help explain this.<sup>257</sup> Voters may not know state legislative party issue stances and may have substantial difficulty figuring them out. In order to vote retrospectively, voters have to know which party is in power and what policies they decide. Voters at the state level often fail at both of these tasks. First, figuring out who is responsible for different policies between federal, state and local officials is frequently quite difficult for voters.<sup>258</sup> Second, state voters frequently do not know which party is in power in the state, making retrospective voting on state issues difficult.<sup>259</sup> Third, where one party has dominated politics for a long time, this becomes particularly difficult. Voters have no basis for assessing a long-term minority party's promises and may simply not believe them when they say they will behave like the state median voter.<sup>260</sup>

Finally, differences among voters may explain the failures of state democracy. Since the 1950s, we have known that some voters'

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252. *Id.*

253. This is despite the fact that voters frequently have relatively clearly organized preferences on local issues. *See generally* Boudreau et al., *supra* note 146 (finding that San Francisco voters have preferences on local issues that fall into two camps but that these preferences do not translate into voting patterns); *see also* Elmendorf & Schleicher, *supra* note 19, at 396–98 (arguing that local parties have little coherent ideology); Schleicher, *City Council Elections*, *supra* note 19, at 439–43 (same).

254. Elmendorf & Schleicher, *supra* note 19, at 400.

255. *See generally* Boris Shor, All Together Now: Putting Congress, State Legislatures and Individuals in a Common Ideological Space to Assess Representation at the Macro and Micro Levels (Jan. 20, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1697352](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697352).

256. Elmendorf & Schleicher, *supra* note 19, at 400.

257. *See id.* at 396–99.

258. For anyone, in fact. David Schleicher, *From Here All-the-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 415 n.12 (2012) (“Voter ignorance is not a problem of a benighted ‘they,’ but rather is a problem for all of us who live in the real world with its competing demands; requirements that we feed ourselves, and the like. If you show me someone who has deeply and truly studied each choice they have to make when voting, I will show you someone who is not all that busy.”).

259. *See* Rogers, *supra* note 18, at 4.

260. *See* Elmendorf & Schleicher, *supra* note 19, at 401.

relationships to political parties are not primarily ideological or based on retrospective assessments of party performance.<sup>261</sup> Rather, they have affective relationships with parties. These voters are members of parties first and their membership defines their ideology and positions on issues. Party affiliation is like a religion, not an expression of the sum of issue preferences. At the national level, this may not matter much; as long as there are a roughly equal number of non-responsive Democrats and Republicans, their voting patterns should wash out.<sup>262</sup> But at the local level, if the rates of voters among Democrats and Republicans that are non-responsive to issues are equal, a big difference in national party membership can make local competition difficult. If a state is sixty percent Republican, and half of all voters are purely affective, in order to win a majority of the vote, a Democrat would need to win sixty percent of all voters who pay attention to state governmental performance, a tall order.

All of these forces likely work together to ensure that voting for state legislature is more responsive to national politics than it is to anything state legislatures actually do. Notably, campaigns for a high-profile office like governor or mayor can buck this trend, as candidates for these offices can develop their own brand in voters' minds.<sup>263</sup> In fact we see competition in gubernatorial and mayoral races, even when we see no competition in the state legislatures and city councils in the same jurisdiction. But down-ballot races are defined by these dynamics.

Having state legislatures appoint senators likely made this worse, as it gave voters, including those conscious of the differences between state and national responsibility and state and national party stances, another reason to use their national preferences in state elections. Even if a voter is fully informed, she may just care more about the identity of a senator than the policies of the state government. But without state legislative appointment of senators, preferences about national politics—the popularity of the President and Congress—play the lead role in determining the results of state legislative elections. As a result, state legislative elections do not make state legislators accountable for their actions or responsive to the preferences of state voters on state issues. State democracy just does not work that well.

Further, state legislatures end up featuring the pathologies of national politics. Congress has, over the last three decades, become extremely polarized, both in terms of distinction between the parties and ideological distance between the preferences of each party's median voter.<sup>264</sup> While

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261. *Id.* at 363, 398. Again, this is not a problem about “some voters” but rather something that describes all of our behavior to some degree. *Id.* at 363.

262. *Id.* at 336. Or rather, if Democrats and Republicans are equally tribal.

263. *Id.* at 359–60.

264. See ABRAMOWITZ, *supra* note 207, at 140–44 (describing changes in polarization in Congress); McCARTY ET AL., *supra* note 207, at 3.

there is a long debate about the causes of polarization, there are widely acknowledged costs and benefits. As E.E. Schattschneider and the “responsible party government” school of scholars argued in the 1950s, polarization makes voting decisions easier for voters, particularly low-information ones, leading to stronger links between preferences and vote decisions, and allows majority parties to overcome institutional and constitutional roadblocks to policymaking during periods of one-party governance.<sup>265</sup> On the other hand, polarization means that during periods of one-party governance, policies may be far from the preferences of the median voter, executive power may be largely unchecked, changes in power may result in wild swings in policy, and agreement between parties may be more difficult when control of the presidency and at least one branch of Congress is split.<sup>266</sup>

As Congress has polarized, state legislatures generally have as well, although there is substantial variation among them. More than half of state legislatures are more polarized than Congress, and polarization is increasing in a majority of state legislative houses.<sup>267</sup> But state legislatures face very different institutional problems than Congress. States generally lack (or have to a lesser degree) many of the institutional burdens that polarized federal parties help overcome, like strongly entrenched bureaucracies, legislative rules like the filibuster, and fixed constitutional impediments. Further, as discussed above, there is little reason to believe that clearer choices between state legislative parties matter very much to voters. The result is that state legislatures can suffer the pathologies of polarization—non-median voter policy results in periods of one-party

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265. See generally Austin Ranney, *Toward A More Responsible Two-Party System: A Commentary*, 45 AM. POL. SCI. REV. 488 (1951); E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* (1942). For a discussion of the responsible party government school and of the benefits of polarization for voters, see Elmendorf & Schleicher, *supra* note 19, at 373–74, 382–83. For a recent paper in this vein, see generally David R. Jones, *Partisan Polarization and Congressional Accountability in House Elections*, 52 AM. J. POL. SCI. 323 (2010) (stating that polarization increases the degree to which majority party incumbents are held accountable for voter dislike of Congress).

266. For summaries and discussions of the costs of polarization to the federal government, see generally Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011); Nicol C. Rae, *Be Careful What You Wish For: The Rise of Responsible Parties in American National Politics*, 10 ANN. REV. POL. SCI. 169 (2007).

267. See Boris Shor, *Polarization Trends in American State Legislatures by Chamber*, MEASURING AM. LEGISLATURES (July 26, 2013), <http://americanlegislatures.com/2013/07/26/polarization-trends-in-american-state-legislatures-by-chamber>; Boris Shor, *State Legislatures and Polarization*, MEASURING AM. LEGISLATURES (May 21, 2013), <http://americanlegislatures.com/2013/05/21/state-legislatures-and-polarization>; Boris Shor & Nolan McCarty, *Ideological Mapping of American State Legislature*, 105 AM. POL. SCI. REV. 530, 540 (2011). A large percentage (although not all) of the less-polarized state legislatures are extremely uncompetitive, with the ten least polarized including states like New Jersey (where control over a house of the legislature last occurred in 1969), Hawaii (1963), and Massachusetts (1958). The ten least polarized legislatures are in order Louisiana, Rhode Island, Nebraska (which has non-partisan elections but has factions that are increasing in polarization), West Virginia, Delaware, Hawaii, Kentucky, Massachusetts, Mississippi, and New Jersey. MICHAEL J. DUBIN, *PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY 1796–2006* (2007).



control, wild swings when power changes hands, and extreme lockups during periods of mixed control—without any of the corresponding benefits. The form taken by national political parties is a response to the needs and demands of national politics, but their structure extends into the states to the detriment of state politics.

The failure of the Seventeenth Amendment to make state democracy work substantially better suggests that reformers were using the wrong tools. We see the phenomenon of second-order elections under a whole variety of different institutional structures, from U.S. states to big cities to European Parliament elections. When reformers attempt to change this dynamic, as they frequently do, they usually focus on formal ties between the levels of government, or the powers allocated to each. The European Union, for instance, has repeatedly increased the power of the European Parliament in the faint hope that at some point it will become powerful enough that voters pay attention to what it does.<sup>268</sup> Faced with a problem of how elections work, the proposed solutions are constitutional in form.

An alternative would be to focus on the mechanics of elections. Elections are not pure representations of voter choice, but are rather structured by laws to achieve certain purposes.<sup>269</sup> If reformers want state elections to serve the purpose of making state officials accountable for their performance, they would need to design election laws that provide voters with information and structure voter choices in ways aimed at that end. One can imagine all sorts of changes, ranging from the quotidian—like labeling which party holds a majority of the seats in the state legislature on the ballot—to the major, like barring national parties from contesting state elections, allowing state specific parties to rise up and contest these elections.<sup>270</sup> But the focus should be on developing election rules that shape party competition to produce outcomes that fit the goal inherent in holding the election in the first place. We hold state legislative elections, presumably, in order to get feedback from state voters on state governmental performance. Our election law rules do not ensure that state elections serve this purpose.

Rather than changing the constitutional structure, we need to look at how we regulate state elections. By doing this, we might be able to fulfill the Seventeenth Amendment's promise and make state democracy work.

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268. See Schleicher, *What if Europe*, *supra* note 19, at 110–15.

269. Paul Edelman illustrates this point nicely by showing that voting for Best Picture in the Oscars is unexplainable were the only goal to represent voters' preferences, but that the voting system exists to achieve other ends (in this case, ratings for the Oscar's broadcast.) See generally Paul H. Edelman, *The Institutional Dimension of Election Design* (Vanderbilt Public Law, Research Paper No. 11-18, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1819306](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819306).

270. See Elmendorf & Schleicher, *supra* note 19, at 50–72 (imagining all sorts of changes, including ones of dubious constitutionality like the one discussed above).

## CONCLUSION

This Article has shown that one of the animating reasons for the passage of the Seventeenth Amendment was a desire to remove consideration of national politics from state legislative elections. It has also shown that it did not succeed in doing so. Our challenge is to consider both how this goal might be achieved and how failure to do so—either because reforms are unsuccessful or not attempted—should change our expectations and understandings of federalism.